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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1040

DR. JOSEPH GILBERT,

Petitioner,

V.

MAX CLELAND and DR. JAMES CRUTCHER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EXPLICATION OF THE ADMINISTRATIVE PROCESS DUE A V.A. PROFESSIONAL EMPLOYEE FACING DISCIPLINARY ACTION UNDER 38 U.S.C. §4110 IS NECESSARY TO RESOLVE THE CRITICAL AND NOVEL QUESTION OF WHETHER SUCH AN EMPLOYEE IS ENTITLED TO ACCESS TO STATEMENTS OF POTENTIAL WITNESSES OR ANY EXCULPATORY INFORMATION DISCOVERED DURING INVESTIGATIONS OF PETITIONER. THIS WRIT SHOULD ALSO BE GRANTED TO DETERMINE WHETHER A TRANSFER IS AN APPROPRIATE DISCIPLINARY ACTION UNDER 38 U.S.C. §4110(d) AND APPLICABLE V.A. REGULATIONS; WHETHER A TRANSFER AND A DEMOTION IS APPROPRIATE UNDER 38 U.S.C. §4110(d) WHEN THE DISCIPLINARY BOARD ONLY RECOMMENDED REASSIGNMENT; AND WHETHER A DEMOTION WHICH DOES NOT PERMIT A PHYSICIAN TO PRACTICE HIS SPECIALTY VIOLATES 38 U.S.C. §4108 WHEN A BOARD OF SPECIALISTS HAS NEVER CONVENED TO CONSIDER A CHANGE IN HIS SPECIALTY RATING.

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NO. _____

DR. JOSEPH GILBERT,

Petitioner,

V.

DONALD JOHNSON, and
DR. MARC J. MUSSER,[1]

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, DR. JOSEPH GILBERT, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The June 16, 1972 order and judgment of the United States District Court for the Northern District of Georgia is unreported (Appendix A, *infra*). The first opinion of the

[1] On May 5, 1975 the trial court allowed an amendment to the complaint substituting Richard L. Roudebush and Dr. John D. Chase for Donald Johnson and Dr. Marc J. Musser as party defendants. The Court of Appeals, however, continued to use the original style. To avoid confusion, Petitioner will also use the original style.

United States Court of Appeals for the Fifth Circuit is reported as *Gilbert v. Johnson*, 490 F.2d 828 (5th Cir. 1974). The Findings and Recommendations of the Veterans Administration's Disciplinary Board were entered July 17, 1974 (Appendix B, *infra*). The Administrator of Veterans Affairs' denial of the Appeal from the Findings and Decision of the Chief Medical Director and the Disciplinary Board was dated March 17, 1975 (Appendix C, *infra*). The July 2, 1976 opinion and order of the United States District Court for the Northern District of Georgia is reported as *Gilbert v. Johnson*, 419 F.Supp. 859 (N.D. Ga. 1976). The September 21, 1976 opinion and order of the United States District Court for the Northern District of Georgia is unreported (Appendix D, *infra*). The August 27, 1979, opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Gilbert v. Johnson*, 601 F.2d 761 (5th Cir. 1979) (Appendix E, *infra*). The denial of the Petition for Panel Rehearing on October 5, 1979, by the United States Court of Appeals for the Fifth Circuit is unreported (Appendix F, *infra*).

JURISDICTION

The jurisdiction for this appeal is grounded in an August 27, 1979 decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Georgia, and the October 5, 1979 denial of a Petition for Panel Rehearing by the United States Court of Appeals for the Fifth Circuit. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the disciplinary board deprived Petitioner of his Fifth Amendment right to procedural due process when it denied him access to witness statements and exculpatory information obtained during the investigations conducted by the V.A. because:
   - A. A liberty and property interest was implicated.
   - B. Petitioner was entitled to more than minimal due process.
   - C. The denial of Petitioner's request for access of the investigatory materials violated the Fifth Amendment.
2. Whether the proposed transfer and demotion of Petitioner to staff physician by the V.A. Administrator violated 38 U.S.C. §4110(d) and applicable V.A. regulations because:
   - A. A transfer is not a permissible disciplinary action.
   - B. The transfer-demotion is inconsistent with and more severe than the disciplinary action recommended by the Disciplinary Board.
   - C. There was no evidence supporting the demotion of Petitioner.
3. Whether the Administrator's proposed action violated 38 U.S.C. §4108(c) when such action would not have permitted Petitioner, a board certified cardio-thoracic surgeon and a V.A. rated surgical specialist, membership in nor any function with the Department of Surgery.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment, United States Constitution:

> No person . . . shall be . . . deprived of life, liberty or property, without due process of law; . . .

STATUTES INVOLVED

38 U.S.C. §4108(c), provides:

> Any person, rated as a medical, surgical, or dental specialist under the provisions of this section shall retain such rating until it shall be withdrawn by the Chief Medical Director. The Chief Medical Director shall not withdraw any such rating until it shall have been determined by a board of specialists that the person holding the rating is no longer qualified in his specialty.

38 U.S.C. §4110(d), provides:

> A disciplinary board, when in its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action, within limitations prescribed by the Administrator, which shall include reprimand, suspension without pay, reduction in grade, and discharge from the Department of Medicine and Surgery of such person. The Administration shall either approve the recommendations of the Board, approve such recommendation with modification or exception, approve such recommendation and suspend further action at the time, or disapprove such recommendation. He shall cause to be executed such action as he approves. The decision of the Administrator shall be final.

STATEMENT OF THE CASE

Petitioner filed his complaint in the United States District Court for the Northern District of Georgia on April 14, 1972, alleging that Respondents, employees of the United States Veterans Administration (V.A.), discharged Petitioner from his position as Associate Chief of Staff (ACOS), Atlanta Veterans Administration Hospital (AVAH), without providing the administrative hearing required by the 38 U.S.C. §4110. On June 16, 1972, the Court entered final judgment holding that Respondents had violated the statute by discharging Petitioner without holding the required hearing. A judgment for back-pay was entered in favor of Petitioner in the sum of Forth-Seven Thousand Two Hundred Eighty-Seven and 82/100 Dollars ($47,287.82). Respondents were ordered to continue Petitioner's pay, and to reinstate Petitioner to duties consistent with his "status and classification" pending conclusion of the administrative hearing. Respondents were not, however, required to permit him to perform the duties of ACOS (App. A-5).

By April 22, 1973, Respondents had neither commenced the statutory hearing nor paid the money judgment, therefore, Petitioner filed a motion to enforce the judgment. On May 10, 1973, the Court denied Petitioner's motion. Petitioner appealed the May 10th Order.

On July 25, 1973, prior to a decision by the Court of Appeals and after three different investigations of Petitioner, the V.A. issued a Letter of Charges which contained 22 specifications. A V.A. Disciplinary Board conducted a hearing on those charged between October 15 and December 12, 1973.

On March 6, 1974, the Fifth Circuit remanded and ordered the District Court to enforce its June 16, 1972

judgment and order. Because of various delays, the District Court never acted to *enforce* its order.

However, on August 8, 1974, the Board's Report of Findings and Recommendations and the Chief Medical Director's concurrence therein were transmitted to Petitioner. The Board found that Dr. Gilbert had "failed to effectively administer the research program . . . because of personality problems . . ." (App. B-11, 12). It recommended "only minimal disciplinary action", (App. B-12) specifically, that Petitioner "be reassigned to another V.A. facility" (App. B-13). On August 17, 1974 this decision was appealed to the V.A. Administrator who upheld the Board on March 17, 1975 (App. C).

On January 14, 1976, Petitioner substituted the undersigned as counsel. On July 2, 1976, the District Court entered an order sustaining the V.A.'s actions, stating that the order would be considered a final judgment unless the parties informed the Court as to what further proceedings may be required.

On July 23, 1976, Petitioner requested that the trial court rule on the matter of additional back-pay, and requested a clarification of his current status with the V.A. On September 21, 1976, the District Court issued an order which awarded Petitioner back-pay from January 1, 1973 to March 17, 1975, and held that his current status should be the subject of a separate action (App. D). In November 1976, all parties filed Notices of Appeal. Petitioner appealed from both the July 2nd and the September 21st Orders. On August 27, 1979, the Fifth Circuit affirmed the District Court's Orders (App. E). The petition for rehearing was also denied on October 5, 1979 (App. F).

FACTUAL CHRONOLOGY

Petitioner submits the following factual chronology with respect to the issues presented herein:

1. On April 18, 1966, Petitioner was employed as ACOS at the AVAH. He had excellent credentials as a cardio-thoracic surgeon. Having graduated from Emory University School of Medicine in 1948, he received training first in general and then in cardio-thoracic surgery at Wake Forest University and Harvard University from 1948 to 1956. From 1956 to 1965, Petitioner was employed as Deputy Chief of Heart Surgery, National Heart Institute, National Institutes of Health. From 1965 to 1966, Petitioner was a Visiting Scientist at the Karolinska Institute in Stockholm, Sweden. He is a board certified cardio-thoracic surgeon and has received recognition by election to all related learned societies and organizations. His entire professional life has been devoted exclusively to cardio-thoracic surgery, and he has 40 scientific publications to l s credit, all in national scientific journals or comprising chapters in recognized texts.

2. According to a written understanding preceding his acceptance of appointment as ACOS at AVAH, Petitioner was to have patient care duties as a cardio-thoracic surgeon at AVAH, was to head the research laboratory, and was to be appointed Assistant Professor of Surgery at the Emory University School of Medicine. It is customary that ACOS's at V.A. Hospitals have patient care duties in their specialty fields. Petitioner was rated and paid by the V.A. as a specialist in his patient care field. Emory University School of Medicine is affiliated with AVAH through the mechanism of a supervisory Dean's Committee, as provided in V.A. Regulations.

3. Despite this understanding and inducement, Petitioner was denied patient-care duties and, despite constant entreaties to Hospital Director Jarman, and the need for cardio-thoracic surgery services, such duties never materialized. His exclusion from patient-care duties is the core from which this litigation sprang; moreover, it was the source of the tension that developed between Petitioner and Dr. Jarman.

4. On the basis of his accomplishments in developing the research program and in conducting his own research, Petitioner was given a Special Citation for Achievement by AVAH, with an increase in salary, as well as academic promotion to the rank of Associate Professor.

5. On May 15, 1969, shortly after receipt of a Site Visit Report,[2] which praised Petitioner, but severely criticized the institutional leadership, Dr. Jarman made the first of three visits to the Dean, seeking the Dean's assistance in removing Petitioner.

6. On April 21, 1970, without notice, Petitioner was informed by Drs. Jarman and Jones (Chief of Staff AVAH) that he was fired without explanation. His request for an administrative hearing was also denied. However, on September 23, 1970, after an Emory Faculty Committee agreed to review Dr. Jarman's actions, he was reassigned by Dr. Jarman to pension examinations, work, which by Dr. Jarman's own admission, an intern could perform. In early 1971, in order to avoid damage to his specialty rating by accepting this menial position,

[2] The Site Visit Report, a product of a routine evaluation of research programs at all V.A. Hospitals, was carried out for the V.A. by impartial non-V.A. scientists and academicians of national stature. It lauded Petitioner's administration of research *inter alia* as "creative" and "dynamic".

Petitioner took leave of absence without pay and undertook refresher training in cardio-thoracic surgery at the University of Leeds, England. The Emory Committee never acted on his case.

7. In February, 1971, while Petitioner was in England, Jarman filed written reports (which he later admitted were totally without foundation)[3] with the V.A. Central Office, Emory University, and also told "a number of people" that Petitioner was "mentally ill" and "homicidal". Petitioner had no knowledge of these reports, which Jarman testified were for the purpose of provoking action against Petitioner by officials of the V.A. Central Office.

8. On April 1, 1971, upon his return from Leeds, he was ordered by the Chief Medical Director to Des Moines, Iowa, VAH for training in general surgery. Considering the fact that he had completed training in general surgery in 1955 and had just finished refresher training in cardio-thoracic surgery, he requested that this order be rescinded, and that he be accorded administrative due process.[4] Despite this request, Petitioner was separated from V.A. employment by Chief Medical Director Musser effective July 30, 1971, for having declined the Des Moines assignment. When Petitioner requested administrative process Musser told him that he had been given

[3] Indeed the testimony before the disciplinary board demonstrated that there was no basis for these allegations which have since haunted Petitioner and have prevented his further employment.

[4] Dr. Norman Ende, Professor of Pathology, EUSM testified during District Court proceedings that an assignment to menial duties, such as the transfer to Des Moines, would seriously damage Petitioner's career, and that Petitioner would be "professionally dead", if he lost his lawsuit.

"that review" and that the actions against him were "not disciplinary".

9. Unable to find any employment, Petitioner filed suit on April 14, 1972.

10. After the June 16, 1972 District Court Order reinstating him pending an administrative hearing, the V.A. initiated the first of three investigations of Petitioner; two and a half years had passed since the V.A. took action against him. This investigation, and those that followed, consisted of questioning "a hundred or so" persons. When Petitioner learned of the investigations, he asked the V.A. for an opportunity to examine the statements and exculpatory materials. This request was made prior to his receipt of the Letter of Charges (July 25, 1973), and was refused.

11. On November 3, 1972, the V.A. initiated settlement negotiations, offering Petitioner an assignment in cardio-thoracic surgery at the Little Rock V.A. Hospital. This was rejected by Petitioner because the V.A. had still refused to comply with the June 16th District Court order.

12. In February, 1973, Petitioner was again ordered to work in the out-patient department, AVAH; he again protested because of the V.A.'s refusal to comply with the June 16th reinstatement order.

13. On July 25, 1973, Petitioner received the Letter of Charges consisting of 22 separate "specifications", which referred to isolated incidents allegedly illustrating Petitioner's "personality" problems. These specifications purported to support a "general charge" that Petitioner had "failed to effectively conduct and administer the research program".

14. The Disciplinary Board proceedings were finally initiated on October 15, 1973, sixteen months after the District Courts initial order that Petitioner be afforded due process.[5] Indeed, it had been over three (3) years since Petitioner was removed from his ACOS position and therefore, both Petitioner and many potentially favorable witnesses were no longer available in Atlanta. Prior to the commencement of those hearings Petitioner filed several prehearing motions. In those motions Petitioner challenged the neutrality of the Board; sought to bar the hearing because, despite his timely request, the evidence to be presented against him had not been disclosed to him; and sought production of the statements, recordings, memoranda, or other writings made by persons interviewed during the V.A. investigations. All of Petitioner's motions were denied.

15. On August 8, 1974, the Disciplinary Board found that only "minimal disciplinary action" should be taken against Petitioner (App. B). On August 17, 1974, Petitioner appealed to the V.A. Administrator.

16. On October 30, 1974, before the administrative appellate process was completed, the Chief Medical Director informed Petitioner that he *would be* transferred to the Birmingham VAH. During the deposition of Dr. Lyndon Lee, Petitioner learned of a teletype from Birmingham VAH confirming the V.A. directive that Petitioner would be excluded from any membership in or function with the Department of Surgery at the Birmingham VAH. (See

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[5] During May 1972, when it became apparent that the V.A. would not obey the June 16th District Court order, Petitioner moved the District Court to enforce the order. This was denied and an appeal was taken. The Court of Appeals, in a strongly worded opinion, criticized the assignment of Petitioner.

infra, at 23). On March 17, 1975, the Administrator informed Petitioner that his appeal had been denied (App. C).

17. Petitioner has never received any official orders implementing the proposed transfer to the Birmingham VAH, nor has he ever been separated from the V.A. His status with the V.A. has never been resolved.[6]

REASONS FOR GRANTING THE WRIT

EXPLICATION OF THE ADMINISTRATIVE PROCESS DUE A V.A. PROFESSIONAL EMPLOYEE FACING DISCIPLINARY ACTION UNDER 38 U.S.C. §4110 IS NECESSARY TO RESOLVE THE CRITICAL AND NOVEL QUESTION OF WHETHER SUCH AN EMPLOYEE IS ENTITLED TO ACCESS TO STATEMENTS OF POTENTIAL WITNESSES OR ANY EXCULPATORY INFORMATION DISCOVERED DURING INVESTIGATIONS OF PETITIONER. THIS WRIT SHOULD ALSO BE GRANTED TO DETERMINE WHETHER A TRANSFER IS AN APPROPRIATE DISCIPLINARY ACTION UNDER 38 U.S.C. §4110(d) AND APPLICABLE V.A. REGULATIONS; WHETHER A TRANSFER AND A DEMOTION IS APPROPRIATE UNDER 38 U.S.C. §4110(d) WHEN THE DISCIPLINARY BOARD ONLY RECOMMENDED REASSIGNMENT; AND WHETHER A DEMOTION WHICH DOES NOT PERMIT A PHYSICIAN TO PRACTICE HIS SPECIALTY VIOLATES 38 U.S.C. §4108 WHEN A BOARD OF SPECIALISTS

[6] The September 21st District Court Order stated that: "The question of Doctor Gilbert's present status at the VAH is not properly before the Court at this time, but rather, it would be more appropriately raised as a separate civil action." (App. D-3).

HAS NEVER CONVENED TO CONSIDER A CHANGE IN HIS SPECIALTY RATING.

1. WHETHER THE DISCIPLINARY BOARD DEPRIVED PETITIONER OF HIS FIFTH AMENDMENT RIGHT TO PROCEDURAL DUE PROCESS WHEN IT DENIED HIM ACCESS TO WITNESS STATEMENTS AND EXCULPATORY INFORMATION OBTAINED DURING THE INVESTIGATIONS CONDUCTED BY THE V.A.

   A. A LIBERTY AND PROPERTY INTEREST WAS IMPLICATED.

Petitioner contends that, at the hearing, the Board violated his Fifth Amendment right not to be deprived of property or liberty without due process of law. In *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972), this Court held that a "legitimate claim of entitlement" to continual employment constitutes a property interest requiring the protections afforded by procedural due process. *See, Arnett v. Kennedy*, 416 U.S. 134 (1974). It has never been disputed that Petitioner had such an interest in his position with the V.A.

Petitioner was also deprived of liberty without due process of law. While this Court has never precisely defined the term "liberty", it has held that:

> "it denotes not merely freedom from bodily restraint but also the right of the individual to contract, [and] to engage in any of the common occupations of life . . ." *Board of Regents v. Roth, supra* at 572.

In *Roth*, the Court in holding that a liberty interest did not exist, found it significant that:

> "there is no suggestion that the State, in declining to re-employ the respondent, imposed on him

a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 573.

In this case there is much more than a "suggestion"; offensive untrue, and highly stigmatizing action was taken by Drs. Jarman and Jones. They sent a report to the V.A. Central Office, to Emory University, and to other unidentified persons, which described Petitioner as being "very mentally ill" and "homicidal". Although the testimony before the Disciplinary Board clearly demonstrated that there was no basis for these libelous statements, and although the Chief and Regional Medical Directors later admitted that these allegations were false, Petitioner has, nevertheless, been unable to find any employment in his professional capacity.[7] Given the peculiar vulnerability of a physician's professional reputation this is not surprising. Petitioner contends that his inability to secure other employment was due to the V.A.'s action and that this must give rise to a liberty and property interest cognizable by the Fifth Amendment.

B. PETITIONER WAS ENTITLED TO MORE THAN MINIMAL DUE PROCESS.

Petitioner contends that he was entitled to more than minimal due process. 38 U.S.C. §4108 and §4110, as well as applicable V.A. regulations, evidence an intent to provide V.A. professional employees with procedural protections greater than those afforded other government employees. They are a codification of Petitioner's property and liberty rights.[8] V.A. regulations state that their

[7] Petitioner is unaware of any effort, by the V.A., to correct any misimpressions drawn from this report. It has never issued a statement retracting the accusations.

[8] This should be contrasted with the absence of any similar statutory rights on behalf of the employees in *Roth* and *Arnett, supra.*

procedural requirements are "over and beyond that required by the C.S.C. [Civil Service Commission]". V.A. Manual MP-5, G-1, DM&S Supplement, Part I, Chapter 2, paragraph 2.03. This same regulation states that, "while CSC procedures are designed for those agencies that hold the hearing after the issuance of the decision . . . V.A. requires the hearing to be held before the decision is made." The regulation also states that "failure to meet any one of these [procedural] requirements will result in reversal at any appellate level regardless of the merits of the case. *Id.* This Court has held that when an agency gratuitously adopts regulations which afford greater protection than is otherwise constitutionally mandated, the regulations must be "scrupulously observed." *Vitarelli v. Seaton*, 359 U.S. 539, 540 (1959).

C. THE DENIAL OF PETITIONER'S REQUEST FOR ACCESS TO THE INVESTIGATORY MATERIALS VIOLATED THE FIFTH AMENDMENT.

Petitioner contends that the Board's denial of his prehearing motion requesting copies of statements and other memoranda made by persons interviewed during the V.A.'s investigations, violated his right to procedural due process. The Fifth Circuit rejected this and Petitioner's other procedural arguments by merely stating that it affirmed the District Court's analysis of the issues. (App. E-12). The District Court relied upon *Davis v. Vandiver*, 494 F.2d 830 (5th Cir. 1974) and *Heffron v. United States*, 405 F.2d 1307 (Ct.Cl. 1969) for the proposition that government employees are not ordinarily afforded the right to prehearing discovery. These cases are inapposite to the present case.

In *Davis* the question of prehearing discovery was not even raised. In *Heffron* the plaintiff argued that he was prejudiced by not having access to an FBI Report upon which the charges against him were based. However, as the Court noted, only a small portion of that report pertained to the plaintiff and that portion was made available to him. *Heffron, supra* at 1311. Therefore, *Heffron only* held that it was not error to deny the plaintiff access to those portions that were not relevant to his case and which were privileged by Department of Justice regulations. None of those factors are present in this case. The V.A. has never contended that any of the withheld statements were irrelevant or privileged.

A determination of whether Petitioner had a right to access to the investigatory statements and, if so, the extent of that right, can only be made by an analysis of the interests involved. *Arnett v. Kennedy, supra.* Recently this Court has articulated those factors which are to be balanced in determining the process which is due in protecting a property interest.[9] Such a determination:

> "... generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of [a property] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

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[9] It should be recalled that Petitioner claims a liberty interest as well. However, even under the lesser "property" standard, Petitioner contends that prehearing discovery was required in this case.

An analysis of these factors leads to the conclusion that access to the investigatory statements should have been required. The private interest that was affected by the V.A. action was substantial. Petitioner was not only deprived of government employment, he was also effectively precluded from finding any employment due to the damage that the "homicidal and mentally ill" allegations and the "transfer-demotion" had on his professional reputation. As Mr. Justice Jackson stated in his concurring opinion in *Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 185 (1951):

> "To be deprived not only of present government employment but of future opportunity for it certainly is no small injury ..."

After 17 years of practice as a cardio-thoracic surgeon and director of research laboratories, Petitioner is now unable to secure any employment in the medical profession. This can only be attributed to the actions taken by the V.A. as set forth above.

The "risk of erroneous deprivation" by not permitting any prehearing discovery and the "probable value ... of additional ... procedural safeguards" was also substantial. Initially, it should be observed that the "value" of discovery in civil and criminal cases has never been questioned. Certainly a litigant can present a more effective defense when he is aware of potentially exculpatory witnesses. No one would doubt that an attorney could more effectively cross-examine a witness if he is aware of the substance of prior statements given by that witness. Since the administrative hearing was held over a year after the V.A. had obtained over 100 signed statements, the value of knowing the content of these statements is obvious. This is especially true since many of the witnesses

admitted that they had memory difficulties [10] and since the V.A. presented no documentary evidence. It should also be noted that Petitioner was not at AVAH when these investigations were conducted. He was not able to conduct his own contemporaneous investigation. Indeed, he had not even been served with a Letter of Charges until after the investigations had been completed and he was not permitted to independently acquire sworn statements from witnesses. Since Petitioner was not able to acquire the information which the V.A. investigations had compiled, and since the utility of this information is as valuable in the administrative fact finding process as in the civil or criminal context, this second factor clearly supports Petitioner's position.

The V.A. has argued that this lack of access to investigatory statements did not prejudice Petitioner because the Board did not rely upon the statements. However, Mr. Sickles, the technical advisor to the Board, personally conducted the third investigation and he had access to all of the statements. He was present during the Board's deliberations. Moreover, V.A. counsel, Stone, also had access to all of the statements. The V.A. was able to select the witnesses who testified by reviewing the statements and determining who would be the most favorable for the V.A. There was no need for the Board to examine the statements; the witnesses had already been screened by Messrs Sickles and Stone. Mr. Stone was able to use these statements during his direct and cross-examinations of the witnesses. Only by having access to the statements

[10] Considering the unconscionable delay in affording Petitioner any administrative process, such memory failures are understandable. The hearing began three and a half years after the Petitioner was dismissed.

could Petitioner have defended himself in these orchestrated and after-the fact proceedings.[11]

Finally, the V.A. would not have been burdened in any significant way by granting Petitioner access to this material. If the V.A. had any legitimate interest which was protected by not disclosing this information, it has failed to articulate it. Since V.A. counsel emphasized that the Board's proceedings were "non-adversary", there could not be any prejudice to the agency from such prehearing disclosure. Indeed, even in the highly adversarial environment associated with criminal actions, the defendant is entitled to exculpatory evidence in the possession of the government, and prior statements of witnesses. *See Brady v. Maryland*, 373 U.S. 83 (1963); and 18 U.S.C. §3500, respectively.

There is precedent for administrative discovery in discharged-employee cases. In *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970), the Court held that a teacher who opposed his termination for cause was entitled to "be advised of the names and the nature of the testimony of the witnesses against him". In *NLRB v. Safway Steel Scaffold Company of Georgia*, 383 F.2d 273 (5th Cir. 1967), the Court held that statements meeting

[11] Access to these statements is particularly important. Many material witnesses were no longer in Atlanta when the V.A. conducted its investigations or when the hearing was held. Indeed, at least one material witness, Dr. Thoroughman, had died during the 16 months between the June 16th Order requiring the hearing and the time the hearing was actually held. Had the V.A. held the hearing prior to Petitioner's removal this prejudice would not have occurred. Petitioner contends that this prejudice, coupled with the V.A.'s failure to afford Petitioner an opportunity to give a response prior to its issuance of the Letter of Charges as required by V.A. Regulation, MP-5, Part II, Trans. No. 9, Chapter 8, Paragraph 5, Section (C), constituted a waiver. Given the prolonged and unexplained delay, and the concomitant prejudice to Petitioner the V.A. should not have been permitted to proceed with the disciplinary hearing.

the requirements of the Jencks Act, 18 U.S.C. §3500, were discoverable in an unfair labor practice proceeding. The Fifth Circuit has stated that:

> "[It] . . . is committed to the doctrine that when good cause is shown to the board it should permit discovery in order that the rights of all parties may be properly protected." *NLRB v. Rex Disposable Div. of DHJ Industries, Inc.*, 494 F.2d 588, 592 (5th Cir. 1974).

Even with this precedent, the Fifth Circuit disposed of this issue in this case without a reasoned analysis which would have led the Court to reach a different result. *See also, Firestone Synthetic Fiber Company v. NLRB*, 374 F.2d 211, 214 (4th Cir. 1967).

Indeed, even the Civil Service Commission Regulations [12] provide that:

> ". . . the material on which notice is based and which is relied on to support the reasons in that notice, *including statements of witnesses*, documents, and investigative reports or extracts therefrom, *shall be* assembled and *made available to the employee* for his review. The notice shall inform the employee where he may review that material." 5 C.F.R. §752.202 (9)(2). (emphasis added).

This requirement makes sense. Since these administrative proceedings are fact-finding in nature, the goal of uncovering the truth can only be furthered by disclosure of all relevant information. If this information is not privileged and, if no undue burden is placed upon the agency by requiring disclosure, then there is no reason not to make this information available to the employee. Moreover, the purported "non-adversery" nature of this type

[12] The V.A.'s regulations go "over and beyond" the protections afforded by the CSC regulations. *supra* at 16.

of proceeding provides additional support for Petitioner's contention:

> "The government's superior ability in obtaining statements and its interest in uncovering the truth rather than winning the case combine to subject it more readily to the fairness of the requirement that it share its statements with other parties." 89 Duke L. J. 116 (1971).

Without knowing the contents of the statements, it is impossible to assess the extent of prejudice occasioned by the Board's refusal to grant Petitioner access to them. However, given the general utility of such information in preparing a case and given the peculiar circumstances of this case, the delay and ex post facto nature of the proceedings, the fact that Petitioner was prejudiced is clear.

Research has failed to disclose any case in which this Court has considered this question as it pertains to a V.A. employee. Given the intent expressed in 38 U.S.C. §4108, §4110 and applicable V.A. regulations to afford professional government employees more than minimal due process, and since the balancing test employed to protect a property and liberty interest demonstrates that prehearing access to investigatory statements should be required, this Court should grant the Petition for a Writ of Certiorari to resolve this question.

2. WHETHER THE PROPOSED DISCIPLINARY ACTION TAKEN BY THE V.A., THE TRANSFER AND DEMOTION OF PETITIONER TO STAFF PHYSICIAN, VIOLATED 38 U.S.C. §4110(d) AND APPLICABLE V.A. REGULATIONS.

In July 1974, the Disciplinary Board concluded that there were:

> Many extenuating and mitigating circumstances

> which move us to recommend only *minimal disciplinary action* which we believe will be in the best interest of Dr. Gilbert and the Veterans Administration. (App. B-12). (emphasis added).

The Board then recommended that Dr. Gilbert be "reassigned" to another V.A. facility. By a letter dated October 30, 1974, Dr. Gilbert was informed that he would be transferred to the V.A. Hospital in Birmingham, Alabama. This letter also stated that the "effective date" of this transfer and "other matters relating to the transfer" would be provided by the Birmingham V.A. Hospital.[13] Petitioner was not told what his new position and duties would be. The Fifth Circuit assumed that the Birmingham transfer would be "in grade and pay, without in any way restricting the full benefits of the doctor's specialty." (App. E-13). There is no evidence on the record to support this assumption. On the contrary, the only evidence on this point unequivocally shows that Petitioner was not going to be permitted to practice his specialty.

On December 12, 1974, during the deposition of the V.A. Central Office Chief of Professional Services, Dr. Lyndon Lee, Petitioner was provided with a teletype communication dated September 24, 1974 between the V.A. Central Office and the Birmingham VAH. This teletype confirms that upon Petitioner's purported transfer to the

[13] Petitioner never received any communication from the Birmingham V.A. Hospital. In fact, he *never* received any notice implementing this transfer. Petitioner maintains that since this transfer was never implemented pursuant to the provisions of V.A. Manual MP-5, Part II, DM&S Supplement, Chapter 8, Paragraph 8A.09, his purported refusal to accept this "non-complete reassignment" could not form a basis for dismissal. Moreover, Petitioner has *never* received a notification of separation from the V.A. Petitioner maintains that he is entitled to receive back-pay until such notices are received. This entire sub-issue was misperceived by the Court of Appeals.

Birmingham V.A. facility, he was to be *excluded* from any membership in the Department of Surgery "or any *function* within such service". (Emphasis added)

The full text of that teletype is as follows:

> "Confirming telephone conference this date with Dr. Hughes this hospital can use Dr. Gilbert as staff physician. *It should be made clear to all concerned that he would not be coming as a member of the department of surgery or have any function within such service.* Possibilities for utilization exist in ambulatory care and/or in cardiovascular research under Dr. E. E. Eddleman. Since I will be absent from the hospital until September 30, request any further contacts or question be made to Dr. Joaquin Aldrete, Chief of Staff." (emphasis added)

Thus, the Fifth Circuit's assumption that the purported transfer would not "in any way restrict the full benefits of the doctor's specialty" is plainly erroneous and not supported by any evidence in the record. (App. E-13). Analysis of this issue must begin with the understanding that the V.A. Administrator had arranged to implement the Board's recommendation by "*transfering*" Petitioner from the AVAH to the Birmingham VAH, and by demoting Petitioner from a rated and salaried surgical specialist and ACOS to a "staff physician" who was not to be permitted any "membership" or "function" in his specialty.

This Court should grant Certiorari because this issue raises novel and important questions of first impression. Specifically, the scope of permissible disciplinary actions under 38 U.S.C. §4110(d), in light of applicable V.A. regulations, has never been considered by any Court. With one exception, no Appellate Court has ever delineated the limits of the V.A. Administrator's discretion to impose

disciplinary action inconsistent with and more severe than that recommended by the disciplinary board.[14]

Only by this Court's resolution of these questions can the V.A.'s ability to attract and retain highly qualified specialist physicians be ensured. Such an ability is dependent upon these physicians' security, particularly with respect to their specialty credentials. Even the most minimal security expectation is not afforded when a V.A. employee may be subject to disciplinary action which was not supported by the record; which was not recommended by the Board; and which was not authorized by applicable statutes and regulations. It was the clear intent of Congress in passing these statutes to ensure the V.A.'s capability of attracting competent physicians in various specialties to serve the multitude of veterans. Thus, there are serious public policy questions presented by this issue.

Petitioner's argument is three-fold: (1) a transfer is not a permissible disciplinary action under 38 U.S.C. 4110(d) and applicable V.A. regulations; (2) the proposed transfer to Birmingham was inconsistent with and more severe than that recommended by the Disciplinary Board; (3) there was no evidence to support the Administrator's action in demoting Petitioner. Such action was unlawful since it was arbitrary and capricious and unsupported by substantial evidence. 5 U.S.C. 706(2)(a) and (e).

A. A TRANSFER IS NOT A PERMISSIBLE DISCIPLINARY ACTION.

A transfer is not a permissible disciplinary action under 38 U.S.C. §4110(d) and applicable V.A. regulations. 38

[14] *See, Kletschka v. Driver*, 411 F.2d 436 (2nd Cir. 1969). The Court held that while a transfer may be an appropriate disciplinary action, the V.A. Administrator may not impose a sanction that was not recommended by the Disciplinary Board. (See discussion *infra*, at 27).

U.S.C. §4110(d) provides in part:

> "A disciplinary board, when in its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action, within limitations prescribed by the Administrator, *which shall include reprimand, suspension without pay, reduction in grade, and discharge . . .*" (emphasis added)

Petitioner submits that since the statute prescribes specific disciplinary actions, it should be construed so as to limit punishments to those specifically enumerated. The Fifth Circuit, however, held that the use of the word "include" indicates that the list of permissible disciplinary actions is not exhaustive. (App. E-13). Such an interpretation is, nevertheless, foreclosed by applicable V.A. regulations. V.A. Manual MP-5, DM&S Supplement, Part II, Trans. No. 9, Chapter 8, paragraph 4 is captioned as "*Authorized* Disciplinary Actions". (emphasis added). Section A of that same paragraph states what types of disciplinary actions are permissible. It states:

> "Disciplinary actions in order of severity are: admonishment, reprimand, suspension, demotion or discharge."

This V.A. regulation clearly limits the type of authorized disciplinary action, and has eliminated a transfer as a permissible disciplinary action.

It has been held that when an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. *Service v. Dulles*, 354 U.S. 363 (1957). Once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate those rules. *U.S. ex rel Accardi v. Shaughenessy*, 347 U.S. 260 (1954). This is precisely what occurred in this case. The

Board violated the above quoted regulation by recommending that Petitioner be "reassigned" and the Administrator committed the same violation by arranging that Petitioner be transferred to Birmingham *and demoted.*

An administrative agency should not be permitted to ignore its own regulations. *Citizens to Preserve Overton Park & Co. v. Volpe,* 432 F.2d 1307 (6th Cir. 1970), rev'd. on other grounds 401 U.S. 402 (1971). The Fifth Circuit erred when it treated this issue as purely a question of statutory construction and ignored the applicable V.A. regulation.

B. THE TRANSFER-DEMOTION IS INCONSISTENT WITH AND MORE SEVERE THAN THE DISCIPLINARY ACTION RECOMMENDED BY THE DISCIPLINARY BOARD.

Even if a transfer is a permissible disciplinary action under 38 U.S.C. §4110(d) and applicable V.A. regulations, the type of transfer-demotion imposed by the Administrator was inconsistent with the Board's recommendation. The Board found that "minimal disciplinary action" was in the best interest of the V.A. and Petitioner, and specifically recommended that he be "reassigned to another V.A. facility." (App. B-12, 13). It made no findings with regard to Petitioner's qualifications as a rated surgical specialist. It made no recommendation that Petitioner should not be permitted to practice his specialty nor did it in any way recommend or suggest that a demotion was appropriate. The transfer, however, would not only reassign Petitioner to the Birmingham V.A.H., but, as the teletype demonstrates, it would also effectively demote Petitioner from his position as ACOS and as a rated surgical specialist to a "staff physician"

th out-patient care duties. This disciplinary action, therefore, violates 38 U.S.C. §4110(d).

38 U.S.C. §4110(d) provides:

> The Administrator shall either approve the recommendation of the board, approve such recommendation with modification or exception, approve such recommendation and suspend further action at the time, or disapprove such recommendation.

This statute does not permit the Administrator to implement a recommendation for reassignment by reassigning and *demoting* Petitioner. The Court in *Kletschka, supra* at 445, stated:

> While under §4110(d) the Administrator is free to reject a recommendation for disciplinary action, *he is not,* as we read the statute, *free to impose disciplinary action which the board has not recommended.* (Emphasis added)

Unfortunately, the Fifth Circuit limited its analysis of this issue by stating that while a "transfer to Siberia" might be a "very disruptive penalty" a transfer from Atlanta to Birmingham "would seem to clearly fit into the recommendation of the board that he be subjected only to minimal disciplinary action". (App. E-13). The Court erroneously failed to consider the demotion aspect of the Administrator's action. Disciplinary action which would prevent a board certified cardio-thoracic surgeon from practing any surgery and restrict his patient care duties to out-patient services is, in effect, a demotion which is more severe than the "minimal disciplinary action" contemplated by the Board when it merely recommended that Petitioner be "reassigned".

If an Administrator can ignore the Board's recommendation and impose a penalty different from and more

severe than the Board's recommendation, then the hearing itself is rendered superfluous. The very purpose of having a hearing and having the Board make findings and recommendations is circumvented and the most minimal procedural protections afforded by the Fifth Amendment and by 38 U.S.C. §4110 are nullified. If for no reason other than to ensure that these minimal procedural protections are not circumvented by such administrative action, this Court should address this question.

C. THERE WAS NO EVIDENCE TO SUPPORT THE DEMOTION OF PETITIONER.

Even if the Administrator's "transfer-demotion" was consistent with the Board's recommendation, there was no evidence on the record to support the Administrator's obvious conclusion that Petitioner was no longer qualified to practice surgery. On the contrary, the only evidence with regard to Petitioner's surgical skills and qualifications was that he was well qualified in his field. In a proficiency report [15] dated June 20, 1968, the Chief of Staff at the AVAH, Dr. Julian A. Jarman, stated that, "Dr. Gilbert is extremely knowledgeable in the field of cardiac thoracic(sic) surgery and physiology . . ." Obviously the V.A., itself, did not have any doubts about Petitioner's surgical abilities when in the Fall of 1972 it attempted to settle the dispute by offering him a position in the Department of Surgery at the Little Rock, Arkansas, V.A. facility.

[15] It is interesting to note that the Proficiency Report for April 12, 1970, to April 12, 1971, issued by Jones, evaluated Dr. Gilbert's "performance" when he was not even at the AVAH. Moreover, the Board admitted this and other Proficiency Reports as evidence against Petitioner even though he had never been advised of their contents nor given an opportunity to respond as required by V.A. Regulation MP-5, DM&S Supplement, Part II, Chapter 6, Paragraph 6.05, Section (a).

There is not a scintilla of evidence indicating that Petitioner was not qualified as a cardio-thoracic surgeon. Indeed, there is little evidence on this subject at all. This is not surprising since the purpose of the hearing, as reflected in the Letter of Charges, was to determine whether Petitioner had failed "to effectively conduct and administer the research program . . . because of personality problems . . ." The entire hearing and the Board's Findings and Recommendations were confined to the resolution of that issue. The hearing had nothing to do with Petitioner's surgical qualifications. Therefore, even if a "transfer-demotion" was procedurally permissible, it was, nevertheless, not supported by the record.

5 U.S.C. §706 provides *inter alia:*

> The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] . . . (E) unsupported by substantial evidence in a case subject to Sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; . . .

Petitioner submits that regardless of whether this Court would choose to apply the "arbitrary or capricious" standard or the stricter "substantial evidence" test, it would conclude that the "transfer-demotion" was unlawful.[16] Assuming, but not conceding, that the evidence

[16] The Court of Appeals cited several Fifth Circuit cases for the proposition that the standard of review in federal employee personnel decisions is limited to a determination of (1) compliance with administrative procedural due process requirements and (2) whether the decision was arbitrary or capricious. (App. E-14). In this regard,

supported the finding that Petitioner "failed to effectively conduct and administer the research program . . . because of personality problems . . .",[17] the total absence of any evidence indicating that he was not qualified as a surgeon renders the "transfer-demotion" unlawful. The Fifth Circuit erred in failing to reverse the District Court's holding that such action was lawful.

3. WHETHER THE ADMINISTRATOR DISCIPLINARY ACTION VIOLATED 38 U.S.C. §4108(c) WHEN SUCH ACTION WOULD NOT HAVE PERMITTED PETITIONER, A BOARD CERTIFIED CARDIO-THORACIC SURGEON AND A V.A. RATED SURGICAL SPECIALIST, MEMBERSHIP IN NOR ANY FUNCTION WITH THE DEPARTMENT OF SURGERY.

As previously indicated, *supra*, at 23, the only evidence indicating what Petitioner's "reassigned" position was to be and the duties he was to assume is the September 24, 1974 teletype communication between the V.A. Central Office and the Birmingham VAH. That communication unequivocally states that he was to be excluded from any membership in the Department of Surgery and that he

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the Fifth Circuit is in direct conflict with the Ninth and Third Circuits which have held that the "substantial evidence" test is applicable in such cases. *Toohey v. Nitze*, 429 F.2d 1332 (9th Cir. 1970); *Charlton v. United States*, 412 F.2d 390 (3rd Cir. 1969).

[17] Petitioner contends that the record does not support this finding. No witness, including Jarman and Jones, was able to cite a single error, lapse, or dereliction by Dr. Gilbert concerning the administration of the research laboratory. Undisputed official records demonstrate that, with more research programs than ever before or since, two career development programs, three foreign fellows and interdisciplinary corroboration with Georgia Tech and the Center for Disease Control, the AVAH's research program attained an unparalleled level and breadth of activity.

was not to be involved in "any function within such service." The record shows that Petitioner was a rated surgical specialist in accordance with 38 U.S.C. §4108(a) and that his salary included an additional allowance because of the specialty rating in accordance with subsection (d) of that statute. Petitioner contends that this type of transfer which would have prevented him from practicing his specialty contravenes 38 U.S.C. §4108(c) which provides:

> Any person, rated as a medical, surgical, or dental specialist under the provisions of this section shall retain such rating until it shall be withdrawn by the Chief Medical Director. *The Chief Medical Director shall not withdraw any such rating until it shall have been determined by a board of specialists that the person holding the rating is no longer qualified in his specialty.* (emphasis added).

The record below is clear that a board of specialists was never convened and the Disciplinary Board made no finding that Petitioner was unqualified in his specialty.

Petitioner contends that 38 U.S.C. §4108(c) is applicable since the Administrator's action would have the effect of stripping him of his specialty. Can there be a more effective way to "withdraw" Petitioner's specialty than by forbidding him to practice in that specialty? The V.A., by disguising this action as an appropriate extension of the Board's recommendation, has effectively circumvented the explicit requirements of Section 4108(c). The only conceivable purpose of this subsection is to ensure that regardless of what other adverse action may be justified, only a board of specialists may determine whether a physician's specialty may be withdrawn and then only when it finds that he is no longer qualified in his specialty. Obviously, Congress was particularly con-

cerned with the security of a physician's specialty rating. Given the importance such a rating has in a physician's career and given the importance of the V.A.'s ability to attract and employ highly qualified medical specialists, such concern is to be expected. This concern and the clear purpose of this statute is, however, totally thwarted when a cardio-thoracic surgeon can be prevented from having any contact with the Department of Surgery without a board of specialists determining that he is no longer a qualified surgeon.

Unfortunately, the Fifth Circuit did not address this issue despite the fact that Petitioner raised it in his brief and in his petition for rehearing. No court has considered the applicability of subsection 4108(c) in circumstances similar to those presented by this case. Only by granting this Petition for a Writ of Certiorari can Petitioner's statutory rights be vindicated and the important Congressional policy behind 38 U.S.C. §4108(c) be effectuated.

CONCLUSION

Petitioner submits that when the denial of access to witness statements and other exculpatory information is considered in conjunction with the statutory violations, the Court will conclude that the cumulative effect has resulted in a deprivation of substantial liberty and property interests without due process of law and that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, MARTIN & CATTS, P.C.

BY: s/ Edward T. M. Garland
EDWARD T. M. GARLAND

BY: Mark J. Kadish
MARK J. KADISH By: EB

BY: David L. Harrison
DAVID L. HARRISON By: EB

1012 Candler Building
127 Peachtree Street
Atlanta, Georgia 30303
404/577-2225

ENTRY OF APPEARANCE

I hereby enter my appearance as counsel for Petitioner, Dr. Joseph Gilbert, Jr., in the above-styled case.

This the 26 day of December, 1979.

BY: s/ Edward T. M. Garland
EDWARD T. M. GARLAND

CERTIFICATE OF SERVICE

I hereby certify that I have this date served three copies of the within and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the Solicitator General, Department of Justice, Washington, D. C. 20530, pursuant to United States Supreme Court Rule 33(2)(a) and upon Mr. H. A. Stephens, Jr., Attorney for Intervenor Lowe, Suite 2334, National Bank of Georgia Building, 34 Peachtree Street, Atlanta, Georgia 30303, pursuant to United States Supreme Court Rule 33(1) by depositing same in the United States Mail in properly addressed envelopes with adequate postage thereon.

This the 26 day of December, 1979.

BY: s/ Edward T. M. Garland
EDWARD T. M. GARLAND

APPENDIX

APPENDIX A

ORDER AND JUDGMENT

(Filed June 16, 1972)

1

Plaintiff brought this action against the defendants Johnson, Musser, and Jarman (Federal defendants) and Emory University, Richardson, and Martin (Emory defendants) asserting that certain actions were taken against him in violation of rights guaranteed by Title 38 U.S.C. § 4110, tenure rights at Emory University, and due process of law.

2

After a preliminary injunction hearing was commenced and recessed, plaintiff moved for the dismissal without prejudice of the Emory defendants, their counsel consented, and the Court entered an Order dismissing the Complaint as against the Emory defendants without prejudice.

3

The matter came back on to be heard on June 5, 1972, at which time the court consolidated the preliminary and final hearings.

4

Plaintiff waived his demand for jury trial and the Court dismissed in open court the damage claim against the defendant Jarman on the grounds of official immunity.

5

The case thus proceeded to trial as a suit against the United States or as against the federal defendants in their official capacity.

6

I find that I have jurisdiction and that venue is properly laid in this district.

7

Plaintiff was employed as Associate Chief of Staff at the Veterans Administration Hospital in Atlanta. Plaintiff was trained as a cardio-thoracic surgeon, but the job of Associate Chief of Staff does not necessarily require a cardio-thoracic surgeon since the duties of the job are the conducting of research and administering the research program of the hospital.

8

In the Spring of 1970 plaintiff was removed from his duties as Associate Chief of Staff at the Veterans Administration Hospital, but continued on the Veterans Administration payroll. In September, 1970, the plaintiff was assigned or detailed the duty of performing veterans compensation claims examinations. Following this assignment or detail, the plaintiff took annual leave, beginning September 28, 1970. The plaintiff went on leave of absence without pay beginning November 30, 1970.

9

On the leave of absence without pay, plaintiff went to Leeds, England where he did refresher work in cardio-thoracic surgery.

10

When plaintiff returned from Leeds, the Veterans Administration ordered the plaintiff transferred to Des Moines, Iowa for training and evaluation as a staff surgeon.

11

Plaintiff refused the assignment and was separated by the Veterans Administration.

12

Plaintiff's first written request for a hearing was made in June, 1971, between the date of the refusal to report to Des Moines and the date of separation from the Veterans Administration service.

13

The sequence of actions referred to and complained of by the plaintiff, that is his suspension as Associate Chief of Staff, his detail to examination of compensation and pension patients, and his transfer to Des Moines and subsequent termination, originated in personality problems or personality misunderstandings between the plaintiff and others of the Veterans Administration set-up. Apparently it became apparent to all concerned that Dr. Gilbert would best serve the Veterans Administration somewhere other than at the Atlanta Veterans Administration Hospital.

14

Therefore, the transfer to Des Moines so far as the Central Office of the Veterans Administration was concerned was for the purpose of enabling Dr. Gilbert to acquire or refurbish skills which might be necessary in other

positions that he might have with the Veterans Administration.

15

The actions of the Veterans Administration were taken in good faith.

16

A major part of the job of Associate Chief of Staff at the Veterans Administration Hospital in Atlanta involved coordination of the research program including the recruitment and stimulation of other investigators who would work with or under the Associate Chief of Staff.

17

A personality deficiency or personality defect that would interfere with the effective performance of that job is, in effect, a species of inaptitude or insufficiency with respect to the job in question.

18

This fact was recognized by the federal defendants who are involved.

19

Therefore, the removal from the job of Associate Chief of Staff, the detail to compensation claims examinations, and the transfer were in effect actions based upon charges of inaptitude or inefficiency and a hearing was required to be held with respect thereto under Title 38 U.S.C. §4110.

20

Because a hearing was required and not held, plaintiff is entitled to back pay and the matter will be remanded to the Veterans Administration for the purpose of giving the hearing required by the Statute but the plaintiff will be entitled to receive compensation until the effective date of the decision of the Board convened under the Statute.

21

However, I do not believe I should order the Veterans Administration to permit the plaintiff to perform the function of Associate Chief of Staff at the Veterans Administration Hospital at this time.

22

I find that the amount of back pay to which the plaintiff is entitled is Forty-Seven Thousand Two Hundred Eighty-Seven Dollars and Eighty-Two Cents ($47,287.82), based upon computations made by the Veterans Administration, and supplied to me by counsel for the defendants. The period covered is November 30, 1970 to June 30, 1972.

Wherefore it is ordered and decreed that the plaintiff be and he is hereby reinstated with the Veterans Administration with the right to receive, until the effective date of a decision by a Board convened by the Veterans Administration in accordance with this order, all the salary and other rights and privileges pertaining to the classification and status he held prior to separation, with the proviso that the defendants are not required, at this time, to permit plaintiff to actually perform the duties of Associate Chief of Staff at the Atlanta Veterans Administration Hospital; and

It is further ordered that the plaintiff have judgment against the United States in the amount of Forty-Seven Thousand Two Hundred Eighty-Seven Dollars and Eighty-Two Cents ($47,287.82) together with interest according to law and costs of this action; and

It is further ordered that the matter is remanded to the Veterans Administration for further consideration not inconsistent with these findings and conclusions.

This 16 day of June, 1972.

/s/ CHARLES A. MOYE
U.S. District Judge

APPENDIX B

Joseph Gilbert, Jr., M.D.
8000 Bay Meadows Circle, Apt. 76
Jacksonville, Florida 32216

Dear Dr. Gilbert:

In a letter dated July 25, 1973, you were informed by the Regional Medical Director, Region 2, that the Veterans Administration was proceeding pursuant to the order of the United States District Court, Northern District of Georgia, Atlanta Division, of June 16, 1972, and pursuant to 38 United States Code 4110 and VA Manual MP-5, Part II, Chapter 8.

Careful consideration has been given to all of the facts including the record of the hearing and the findings and recommendations of the Disciplinary Board. I agree with the findings of the Disciplinary Board that you failed to effectively conduct and administer the research program because of personality problems. Further it is my decision that you be reassigned to another Veterans Administration facility.

Accordingly, you will be reassigned and transferred to another Veterans Administration facility. You will be advised later of the specific assignment and location.

Enclosed is a copy of the report of the Disciplinary Board. Under separate cover, you will receive a copy of the hearing transcript.

If you believe this decision is unwarranted, you may appeal it on the record to the Administrator within 15

calendar days. Your appeal should be in writing and forwarded through this office.

Sincerely yours,

cc: Mr. Sam F. Lowe, Jr.
c/o Smith, Cohen, Ringel, Kohler,
Martin, and Lowe, Attorneys at Law
2400 1st National Bank Tower
Atlanta, Georgia 30305

JOHN D. CHASE, M.D.
Chief Medical Director

BOARD ACTION.

JOSEPH W. GILBERT, JR., M.D.	ACOS for R&E (Assoc. Chief Staff)	Chief 9	VAH Atlanta, Ga.

INITIATING BOARD

☐ INITIAL ☒ SUBSEQUENT ☐ FINDINGS	Central Office	7/17/74

Hearing Started: October 22, 1973 - Hearing Completed December 12, 1973

Place: VA Regional Office, Atlanta, Georgia

Members of the Disciplinary Board: Chairman - Lawrence Christianson, M.D.

Secretary - H. Reynold Fiege, Jr., M.D.

Member - C. Cooper Bell, Jr., M.D.

FINDINGS

The Board has intensively reviewed and considered the voluminous testimony and documents submitted in the case of Dr. Joseph Gilbert, Jr., who has been charged with failure "to effectively conduct and administer the research program of the Veterans Administration Hospital because of personality problems and personality misunderstanding between yourself and others of Veterans Administration Hospital and Emory University Medical School (EUMS) and your conduct was frequently unsuitable for a VA employee as evidenced by ....." 22 specific citations or specifications purporting to support the main or general charge.

The three basic categories of charges which can be levied against a career DM&S employee are inaptitude, inefficiency and misconduct. The intent of the Veterans Administration appeared to be an attempt to prove Dr. Gilbert's inaptitude on the basis of his personality, which precluded or destroyed his capability of establishing and preserving effective interpersonal relationships at the working level in his hospital and its affiliated medical school. This avenue of discipline appeared to follow Judge Charles A. Moye's ruling in U.S. District Court, Northern District of Georgia, which found that while the VA had erred in discharging Dr. Gilbert without a hearing, nevertheless the VA could inquire into Dr. Gilbert's aptitude on the basis of "a personality deficiency or personality defect that would interfere with effective performance of that job."

The Board in its deliberations has been faced with the difficult task of dealing with individual specific specifications as well as with the overall

(Continued on attached Page 2)

B-2

FINDINGS (Cont'd)

proposition that Dr. Gilbert was inept in his interpersonal relationships and his effectiveness as a program leader within a complex organization. That emerges from a review of the evidence submitted on the charges is the conclusion of the Board that Dr. Gilbert progressively irritated, estranged and eventually alienated many professional peers, most key administrators and some ancillary and administrative personnel with whom he had contact. This was far from a total estrangement. It was quite apparent from the testimony that some colleagues who shared Dr. Gilbert's attitudes and convictions could interact with him effectively. Nevertheless, Dr. Gilbert succeeded over a four year period in losing the confidence and support of the Hospital Director, Chief of Staff, Chiefs of several major clinical services, the Dean of the Affiliated medical school and the leadership of the Department of Surgery. While many of these differences arose over matters of principle, there appeared to have been an inability on the part of Dr. Gilbert to accept the realities of the situation and to work patiently with the hospital and the school to build a successful research program.

In consideration of the testimony and documentation, the evidence to support the Board's findings can perhaps best be epitomized by citation of Dr. Gilbert's annual proficiency reports for the years of 1968 and 1970, introduced in connection with testimony of Dr. Lewis E. Jones, Chief of Staff, VAH, Atlanta, in regards to specification #II. These reports were also pertinent to specification #I (Dr. Julius Jarman, Hospital Director). In June, 1968, Dr. Gilbert was noted to be, "extremely knowledgeable in the field of cardiac surgery and physiology. He is dedicated to his mission—an untiring worker with tre-

FINDINGS (Cont'd)

mendous drive—sometimes impatient with those who are less dedicated and this has not always stimulated the best in communications." These words were written by Dr. Jarman, then Chief of Staff, and approved by Dr. John G. Hood, then Hospital Director. The numerical score on the Proficiency Report at that time was 83.5 (out of possible 88), with all ratings in the 7 and 8 columns except "emotional stability," marked 6.

In March, 1970, Dr. Lewis Jones was Chief of Staff and rated Dr. Gilbert numerically at 66.5, with a 3 for "interpersonal relationships," a 4 for "emotional stability" and a 5 for "dependability." The balance of marks were in the 7 and 8 columns. In the narrative portion, Dr. Jones noted:

"The Research Program at this hospital does not approach the quality that is possible. It is my impression that there are few persons, if any, who would disagree with this estimate, including Dr. Gilbert himself. In my opinion, by far the most important reason for this failure has been Dr. Gilbert's inability to instill enthusiasm and his failure to encourage participation in research on the part of our staff. In fact, because of very poor interpersonal relationships, Dr. Gilbert has discouraged persons from even visiting the research areas of the hospital. Dr. Gilbert's unsatisfactory relations extend outside this hospital to involve persons in the Medical School including the Chairman of Departments."

"For the most part, information about research activities has been limited to the research area because Dr. Gilbert has secluded himself within his office and laboratory. Everyone agrees that Dr. Gilbert has a brilliant mind and an extraordinary ability to express his thoughts both verbally and in writing; however, hisextre me egocentric-

FINDINGS (Cont'd)

ity makes it almost impossible for him to sensibly perceive and interpret what others are thinking or saying. It seems to me that this is the real basis for his extremely poor administrative ability. He would probably function better as an independent investigator, relieved of administrative responsibilities. In my opinion, it is not possible at this point for Dr. Gilbert to reconstitute any worth while relationsips at this station which he may have had in the past or to generate new ones. I see no way that the research program at this hospital can profit from his continued presence. . . ."

Dr. Jarman added the following remarks to the 1970 Proficiency Report; ". . . concur . . . Dr. Gilbert as has been said, has a vast storehouse of knowledge, is extremely conscientious and is a very diligent worker. It is too bad that his vast energies have not been more fruitful. His relationships with almost everyone with whom he has come into contact in this institution have progressively deteriorated . . . He seems to have no insight into his interpersonal difficulties . . ."

While vigorously rebutted by Dr. Gilbert as to specific detail, these proficiency reports nevertheless represent the perceptions of hospital management at the times they were written and appear to indicate a progressive deterioation of management's confidence in Dr. Gilbert as a program official. Another Proficiency Report dated 9/3/71, over a year after Dr. Gilbert's suspension from Associate Chief of Staff duties, continued to reflect the same attitude on the part of VA Hospital officials.

Another document entered in relationship to Dr. Jarman to testimony in specification #I is a letter from Dr. Jarman to VA Central Office dated 5/6/70 requesting reassignment of Dr. Gilbert. This letter alluded to problems

FINDINGS (Cont'd)

which began to develop early in Dr. Gilbert's sojourn at Atlanta (1966-1970) with regard to his relations to others. Dr. Jarman stated that there had been a progressive breakdown to Dr. Gilbert's communications with "almost everyone in this hospital and Emory." Dr. Jarman cited Dean P. Richardson, Dean, EUMS, as concurring and this was confirmed by Dean Richardson's direct testimony in relationship to specification #IX. Basis for the proposed reassignment of Dr. Gilbert was Policy Memorandum #2, 1/30/46, which provides for reassignment of VA Service Chiefs on request of the Dean's Committee. While no formal meeting of the Dean's Committee occurred at VAH, Atlanta, during Dr. Gilbert's active assignment, it was the position of Drs. Richardson and Jarman that informal communications between them and with appropriate Department Heads constituted the normal operating procedure for Dean's Committee business at that hospital at that time.

In direct testimony, Dr. Jones stated that he felt that Dr. Gilbert's personality was an unusual one, and certainly one that was difficult for other people to deal with and that in turn made it difficult for him to deal with others. Dr. Jones testified that he over a long period of time saw Dr. Gilbert almost daily and that, "things had gotten to be so unpleasant that I started seeing him less and less, and then finally to the place that I didn't see him at all except when I had to for some official reason". Dr. Richardson claimed that as a result of Dr. Gilbert's criticism of the quality of EUMS medical research at a meeting at Grady Hospital, that, "The Chairmen of the Departments really wished to have the meeting cut off and expressed an opinion that they didn't want to have anything to do with Dr. Gilbert."

FINDINGS (Cont'd)

Several VA Service Chiefs testified at the hearing. Dr. J. C. Crutcher, Chief, Medical Service, stated that in his judgement, Dr. Gilbert was unable to effect a harmonious relationship and interaction between members of the hospital staff as related to their research activities (spec. #III). Dr. Crutcher felt that Dr. Gilbert had alienated himself from members of the hospital staff and did not become part of the hospital team. Dr. Crutcher concluded that he had best avoid confrontations with Dr. Gilbert because of "overreaction" on Dr. Gilbert's part. Dr. Crutcher did not, however, give specific examples. Dr. Robert B. Smith III, Chief, Surgical Service, stated that Dr. Gilbert had been critical of the department of surgery Chairman at EUMS and had been unable to establish a required rotation of surgical residents through Research Service nor attract the residents on an elective basis. Dr. Smith, in testifying on Specification #XIII, brought out Dr. Gilbert's disappointment and frustration over his failure to gain a significant clinical surgical appointment at the VAH, due in major part to resistance from chairman and members of the EUSM Department of Surgery. The Board never was able to determine the basis for this attitude, which became a source of increasing frustration for Dr. Gilbert and no doubt contributed to many of the interpersonal difficulties he experienced. In this regard, testimony of Drs. Jarman, Jones and Richardson relating to Specifications # I, II, IX did indicate that Dr. Gilbert was initially offered the opportunity to take surgical night consultant calls, which he declined, and later had an opportunity to participate as a consultant in the Emory open heart surgery program. It was apparent to the Board, however, that Dr. Gilbert would not accept a lesser clinical role than that for which he felt he was qualified. Dr. J. C. Coberly, Chief of Nuclear Medicine;

FINDINGS (Cont'd)

testified in relationship to Spec. #VII that he experienced increasing difficulty in oral communication with Dr. Gilbert, e.g. "when I would try to present a problem to him, he would tell me his problem and I did not get to participate in the conversation." Dr. Coberly also testified that he withdrew from contact with Dr. Gilbert because he did not find the contact pleasant.

At the level of professional peers and colleagues, Dr. Gilbert's score is mixed. In testimony regarding Spec. #V, Dr. Ruth Wichelimusen testified that she did not have an "effective relationship" with Dr. Gilbert with respect to the administration of her function at the VAH. Dr. William C. Butz evidenced difficulty in obtaining assistance in furthering his research ideas (Spec. #XV). Dr. Julius Wenger expressed unhappiness in Dr. Gilbert's handling of his research funds in his testimony regarding Spec. #IV, stating that Dr. Gilbert avoided discussion of his research funding with him. Dr. George Calloway also expressed dissatisfaction in dealing with Dr. Gilbert on research matters (Spec. #IV). It should be noted that cross examination of these witnesses brought out much evidence of misunderstanding and perhaps even ill-will on their part. What does emerge from testimony of these witnesses is the opinion that while Dr. Gilbert was correct in policy and procedure, he nevertheless succeeded in incurring disappointment, hurt feelings and perhaps even animosity in others.

It should be pointed out here that defense witnesses, particularly Drs. Shirley Rivers and Norman Ende, were able to work effectively in a research setting with Dr. Gilbert. Unfortunately, Dr. Ende fell out of favor with EUMS himself and left to accept a department chairmanship in another medical school. Dr. Rivers continued

FINDINGS (Cont'd)

her professional relationship with Dr. Gilbert for some time but also left the VA for the directorship of the local blood bank. Dr. Michael Gravanis was another scientist who worked productively with Dr. Gilbert for some time. In his testimony regarding Spec. #X he eventually terminated his relationship with Dr. Gilbert in part due to time constraints and in part due to his apparent discomfort over the increasing intensity of Dr. Gilbert's complaints against VA and EUMS officials. The fact that Dr. Gravanis received the chairmanship of the Department of Pathology at EUMS may also have been a factor in Dr. Gravanis' withdrawl from a working relationship with Dr. Gilbert.

Several key hospital officials in ancillary or administrative areas also gave testimony about their relationships with Dr. Gilbert. Mr. Scott, Chief of Medical Illustration avowed regarding Spec. #XIV that he would not want to work with Dr. Gilbert again if given a choice. Mr. Howard Stone, Chief Engineering Service in testifying on Spec. #XXI and XXII, stated he could not now work effectively with Dr. Gilbert. Mr. Stanley Buffa, Chief, Supply Service, stated in regard to Spec. #IX and XX, that he tried to avoid dealing with Dr. Gilbert. These reactions were largely subjective and the Board could not canvass the entire personnel roster of VAH, Atlanta, to determine whether these attitudes and reactions to Dr. Gilbert's personality were universal. While Dr. Gilbert effectively rebutted the specifications of the charge involving these witnesses, the impression remains that his manner and attitude evoked negative responses in these witnesses which appeared to hamper his interpersonal relationships and effectiveness in the organization.

FINDINGS (Cont'd)

The Board notes that in the four years of Dr. Gilbert's active tenure as Associate Chief of Staff, he developed many protocols, proposals and reports. However, there was no evidence presented of the initiation of any research career development program, of any traineeship application actually funded, or of foreign research fellowships developed and funded. There was not a single instance in which outside research collaboration involving program development, i.e., with the Center for Disease Control, NASA or Georgia Tech, was finalized, approved and funded. This lack of accomplishment could in no way be attributed to Dr. Gilbert's lack of ability, diligence or energy. These frustrations we believe can be attributed in great part to the formidable opposition to him within the VAH and EUMS. He must, we believe, bear some responsibility for the apparent antagonism evoked by his personality.

The Board recognizes that Dr. Gilbert did accomplish some things and proposed many more admirable programs in the face of obstruction. It is also quite apparent to the Board through testimony and direct observation that Dr. Gilbert is a man of high principle and laudable ambition. He will not accept second best and will fight vigorously for his beliefs. That he should return to his native state and his alma mater to meet such eventually overwhelming opposition is ironic. However, we must conclude that based on the opposition apparently evoked by Dr. Gilbert's personality, that his efforts to develop a significant research program at VAH, Atlanta, were eventually and significantly frustrated.

To this extent the Board must therefore sustain the charge alleging Dr. Gilbert's failure "to effectively conduct and administer the research program . . . because

FINDINGS (Cont'd)

of personality problems . . .". We do not find specific evidence of inefficiency or of misconduct. We find many extenuating and mitigating circumstances which move us to recommend only minimal disciplinary action which we believe will be in the best interests of Dr. Gilbert and the Veterans Administration.

See below

Recommendation ✓

The Disciplinary Board recommends that Dr. Gilbert be reassigned to another VA facility.

10. SIGNATURE OF INITIATING BOARD MEMBERS (All signatures MUST be dated)

A. CHAIRMAN — Lawrence N. Chamberlain 7/19/74 MD

B. MEMBER — C. Cooper Bell Jr 7-17-74

C. MEMBER

D. MEMBER

E. SECRETARY — 7/15/74

11. Certification of initiating board technical adviser that board action is complete and has been reviewed for adherence to all legal and technical requirements before being forwarded to approving authority. → SIGNATURE: Carl C Lickley — DATE: 7/30/74

REVIEWING BOARD

12. REVIEWING BOARD RECOMMENDATIONS AND REMARKS

13. SIGNATURES OF REVIEWING BOARD MEMBERS (All signatures MUST be dated)

A. CHAIRMAN

B. MEMBER

C. MEMBER

D. MEMBER

E. SECRETARY

ACTION BY APPROVING AUTHORITY

14. ACTION: ☒ APPROVED ☐ DISAPPROVED

15. DATE: 7/31/74

16. SIGNATURE AND TITLE OF APPROVING AUTHORITY: [illegible] M.D., Chief Medical Director

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APPENDIX C

VETERANS ADMINISTRATION
OFFICE OF THE ADMINISTRATOR OF VETERANS AFFAIRS
WASHINGTON, D. C. 20420
MARCH 17 1975

Joseph Gilbert, Jr., M.D.
8000 Bay Meadows Circle, Apt 76
Jacksonville, Florida 32216

Dear Dr. Gilbert:

Your appeal of the Chief Medical Director's decision to transfer you to another Veterans Administration facility has been very carefully considered.

A review of the entire record including the findings of the Disciplinary Board reveals that the charge sustained by the Chief Medical Director is substantiated by the evidence. This review also takes into account the representations made in your appeal of this decision. I find the decision to transfer you was proper.

Accordingly, the decision of the Chief Medical Director is sustained.

Sincerely,

/s/ RICHARD L. ROUDEBUSH
RICHARD L. ROUDEBUSH
Administrator

This Certified Ltr

#48166

Delivered 3/24/75
G L Decker
Letter Carrier Badge 575
Pottsburg Station
Jax Fla 32216

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Filed in Clerk's Office Sept. 21, 1976;
Ben H. Carter, Clerk; By /s/, Deputy Clerk.]

DR. JOSEPH GILBERT

vs.

RICHARD L. ROUDEBUSH, et al.

CIVIL ACTION NO. 16424

ORDER OF COURT

In the Court's Order entered July 2, 1976, in the above matter granting judgment in favor of the defendants, the parties were given ten (10) days during which to inform the Court as to what further proceedings may be required in this matter.

Plaintiff has indicated three matters which he alleges merit further consideration by the Court: (1) the amount of back pay owed plaintiff; (2) the impropriety of the defendant's decision to transfer plaintiff to another Veteran's Administration Hospital (VAH); and (3) a determination of plaintiff's present status at the VAH. Furthermore, the case is presently before the Court on Sam F. Lowe, Jr.'s motion for a protective order as to attorney's fees and expenses, and to be relieved as counsel for plaintiff.

Back Pay

In the Order entered June 16, 1972, the Court stated as follows:

> "Because a hearing was required and not held, plaintiff is entitled to back pay and the matter will be

remanded to the Veterans Administration for the purpose of giving the hearing required by the statute, but the plaintiff will be entitled to receive compensation until the effective date of the decision of the Board convened under the statute.

* * *

"That the plaintiff be and he is hereby reinstated with the Veterans Administration with the right to receive, until the effective date of a decision by a Board convened by the Veterans Administration in accordance with this Order, all the salary and other rights and privileges pertaining to the classification and status he held prior to separation, ..."

It appears to the Court that plaintiff was paid his salary through December 1972, and has received no further remuneration from the Veterans Administration since that time. The Disciplinary Board issued its decision on July 17, 1974. Subsequently, on August 17, 1974, plaintiff appealed the implementation of that decision, i.e., to transfer plaintiff to another VAH, to the Administrator. The Administrator, on March 17, 1975, sustained the Board's decision and the resulting implementation of that decision.

The defendant is hereby ORDERED to pay plaintiff the remuneration to which he is entitled from January 1, 1973, through March 17, 1975, which is the effective date of the Board's decision, in accordance with the terms of the Court's order of June 16, 1972, and with interest according to law. Doctor Gilbert is not entitled, however, to remuneration for those time periods during which he took a leave of absence.

Plaintiff's Transfer

Plaintiff contends that the decision to transfer him is inconsistent with the Board's decision recommending only "minimal disciplinary action." Moreover, plaintiff alleges

that the type of transfer envisaged contemplates punishment of the severest type conceivable for a professional, exceeding that recommended by the Board.

In the Court's Order of July 2, 1976, the Court indicated that the decision to transfer plaintiff was in accordance with the terms of the Board's decision and the prevailing authority on this subject. Accordingly, the plaintiff's objections in this regard are hereby ORDERED OVERRULED.

Plaintiff's Present Status

Plaintiff requests the Court to clarify his status at the VAH by ordering the VAH to assign plaintiff a position that is consistent with the Board's recommendation and consistent with the holding in *Kletschka v. Driver*, 411 F.2d 436, 444-45 (2nd Cir. 1969):

> "While under Section 4110(d) the Administrator is free to reject a recommendation for disciplinary action, he is not, as we read the statute, free to impoee disciplinary action which the Board has not recommended."

Presumably the VAH will act consistently with the Board's decision and the law. The question of Doctor Gilbert's present status at the VAH is not properly before the Court at this time, but rather, it would be more appropriately raised as a separate civil action.

Motion for a Protective Order

Sam Lowe, Jr., Doctor Gilbert's former counsel, requests that the Court issue a protective order relating to an asserted claim for attorney's fees in the sum of $47,117.40. Mr. Lowe has presented the Court with no authority for such relief other than a similar application made to the

Court by Mr. Lowe's predecessor as attorney for Doctor Gilbert. The question of attorney's fees at that earlier time was settled by the parties and a consent order was entered. See Order entered December 14, 1973. Mr. Lowe has entered into no such consent agreement with the plaintiff. Sam Lowe, Jr.'s motion for a protective order as to fees and expenses is hereby ORDERED DENIED. Sam Lowe, Jr.'s motion to be relieved as counsel for plaintiff is ORDERED GRANTED.

SO ORDERED, this 20 day of September, 1976.

/s/ CHARLES A. MOYE, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed in Clerk's Office Oct. 22, 1976,

Ben H. Carter, Clerk; By /s/, Deputy Clerk]

DR. JOSEPH GILBERT v. DONALD JOHNSON, et al.	CIVIL ACTION NO. 16424

ORDER OF COURT

The defendants' motion for reconsideration in the above matter is hereby ORDERED DENIED.

SO ORDERED, this 21 day of October, 1976.

/s/ CHARLES A. MOYE, JR.
United States District Judge

APPENDIX E

Dr. Joseph GILBERT,

Plaintiff-Appellant-Cross-Appellee,

v.

Donald JOHNSON et al.,
Defendants-Appellees-Cross-Appellants,

Sam F. Lowe, Jr., *Movant-Appellant.*

No. 77-1063.

United States Court of Appeals,
Fifth Circuit.

Aug. 27, 1979.

Rehearing Denied Oct. 5, 1979.

Action was brought against veterans administration hospital personnel arising from termination of physician's employment for refusal to accept transfer. The United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., J., 419 F.Supp. 859, found no error in the actions of the Veterans Administration. On appeal, the Court of Appeals, Tuttle, Circuit Judge, held that: (1) administrative record of Veterans Administration which resulted in disciplinary action involving transfer of physician demonstrated that physician had received administrative due process to which he was entitled and that action was neither arbitrary nor capricious; (2) transfer of physician was appropriate action to be taken under disciplinary board's recommendation of "only minimal disciplinary action;" (3) physician was entitled to payment of salary until date of board's final decision; and (4) physician's former attorney should have been allowed to intervene in litigation to protect his interests in fees covering services theretofore rendered.

Affirmed in part; reversed in part, and remanded.

Alvin B. Rubin, Circuit Judge, concurred specially and filed opinion.

1. Hospitals

Courses of action that can be recommended by disciplinary board which is convened to consider charges against physician in connection with employment at veterans administration hospital need not be limited to one of four courses of action actually mentioned in statute. 38 U.S.C.A. § 4110(d).

2. Hospitals

Transfer of physician from employment as associate chief of staff at veterans administration hospital was appropriate action to be taken against physician even though disciplinary board's recommendation was of "only minimal disciplinary action." 38 U.S.C.A. §§4110, 4110(d).

3. Hospitals

Though disciplinary board which was convened to consider charges against physician in connection with his former employment as associate chief of staff at veterans administration hospital did not specifically find against physician with respect to 22 specifications, board's action in sustaining general charge of inaptitude by physician in failing to effectively administer research program was not error. 38 U.S.C.A. § 4110.

4. Constitutional Law

Administrative record of Veterans Administration which resulted in disciplinary action involving transfer of physician demonstrated that physician received administrative due process to which he was entitled and that action was neither arbitrary nor capricious. 38 U.S.C.A. § 4110; U.S.C.A. Const. Amend. 5.

5. Hospitals

Physician who was discharged from employment with veterans administration hospital for failure to accept transfer was entitled to receive back pay and compensation from veterans administration until effective date of decision of disciplinary board to which he was statutorily entitled prior to discharge. 38 U.S.C.A. § 4110.

6. Federal Civil Procedure

Under Georgia law, which allows plaintiff's lawyer a lien upon cause of action being asserted for payment of compensation contracted to be paid for such services, plaintiff's former counsel had right to intervene in action to protect his interests for the covering services theretofore rendered. Code Ga. § 9-613.

Mark J. Kadish, Atlanta, Ga., for Gilbert.

H. A. Stephens, Jr., Atlanta, Ga., for Lowe.

William L. Harper, U. S. Atty., William D. Mallard, Jr., Asst. U. S. Atty., Robert J. Castellani, First Asst. U. S. Atty., Atlanta, Ga., Martin Hollander, Atty., Civ. Div., Dept. of Justice, Washington, D. C., for defendants-appellees-cross-appellants.

Appeals from the United States District Court for the Northern District of Georgia.

Before TUTTLE, GOLDBOLD and RUBIN, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal from a judgment of the trial court denying to Dr. Gilbert the relief he sought against the United States Veterans Administration Hospital personnel for terminating his employment for refusal to accept a transfer from Atlanta to Birmingham.

The correctness of the judgment below depends primarily upon the answer to two questions: (1) Does the administrative record of the Veterans Administration which resulted in the disciplinary action involved in the transfer demonstrate that Dr. Gilbert had received the administrative due process to which he was entitled, and was the action neither arbitrary nor capricious? (2) was the action of the Veterans Administration within the scope of the findings and conclusion of the disciplinary board? that is, was a transfer of appellant appropriate action to be taken under the disciplinary board's recommendation of "only minimal disciplinary action?"

The defendants also appeal that part of the trial court's judgment that awarded Dr. Gilbert his full compensation between January 1, 1973 and March 17, 1975, excluding those periods during which Dr. Gilbert was on leave of absence.

The trial court viewed its function in determining whether Dr. Gilbert was entitled to relief as encompassing a review of the administrative record to determine whether the plaintiff had received the kind of hearing that is provided for persons in such a situation by the statutes, regulations of the Veterans Administration and under the due process clause of the Fifth Amendment to the Constitution. In doing so, the court correctly noted that in this Circuit judicial review of federal employee personnel decisions is limited to a determination of (1) whether the

employee has been afforded administrative procedural due process as provided by statute, regulations and the Constitution; and (2) whether the decision was arbitrary or capricious. These standards are distilled from our decisions in *Davis v. Vandiver*, 494 F.2d 830 (5th Cir. 1974); *Mann v. Klassen*, 480 F.2d 159, 161 (5th Cir. 1973); *Dozier v. United States*, 473 F.2d 866 (5th Cir. 1973); *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968) and *Chiriaco v. United States*, 339 F.2d 588 (5th Cir. 1964). In reaching this conclusion, the trial court outlined extensive findings as to the contents of the administrative record. These include the following.

Dr. Gilbert was a trained cardiothoracic surgeon with 17 years experience when he was recruited by the Veterans Administration to be Associate Chief of Staff for Education and Research [ACOS] at the Atlanta hospital in late 1965. At the time he joined the hospital, he understood that he would have patient care duties in his specialized field, cardiothoracic surgery, besides administering the research program at the Atlanta VA Hospital. This hospital is affiliated in some degree with Emory University Medical School. The ACOS assignment did not necessarily require a cardiothoracic surgeon, since the duties of his new position were the conducting of research and administering the research program of the hospital.

The desired patient care responsibilities during his tenure between 1966 and 1970 did not develop, resulting in disappointment on Dr. Gilbert's part, coupled with frustration and apparent criticism by some of the persons responsible for this state of affairs. These included Dr. Jarman, the VA Hospital director and Dr. Martin, Chief of Surgery at Emory University Medical School. By March, 1970, it became apparent to Dr. Jones, Chief of

Staff at the VA Hospital at that time, that Dr. Gilbert's "poor interpersonal relationships" with the VA staff were interfering with his administration of the research program at the hospital. He made this a subject of his annual proficiency report.[1]

As a result of Dr. Jones' presentation, which apparently represented the hospital management's view of Dr. Gilbert' s problems, Dr. Jarman, the Hospital Director, undertook to relieve Dr. Gilbert of his duties as Associate Chief of Staff, although retaining him on the Veterans Administration payroll for the purpose of continuing his own research. This action was followed by a May 6, 1970 letter

[1] This report included the following:

> The Research Program at this hospital does not approach the quality that is possible. It is my impression that there are few persons, if any, who would disagree with this estimate, including Dr. Gilbert himself. In my opinion, by far the most important reason for this failure has been Dr. Gilbert's inability to instill enthusiasm and his failure to encourage participation in research on the part of our staff. In fact, because of very poor interpersonal relationships, Dr. Gilbert has discouraged persons from even visiting the research areas of this hospital. Dr. Gilbert's unsatisfactory relations extend outside this hospital to involve persons in the Medical School including the Chairmen of Departments.
>
> For the most part, information about research activities has been limited to the research areas because Dr. Gilbert has secluded himself within his office and laboratory. Everyone agrees that Dr. Gilbert has a brilliant mind and an extraordinary ability to express his thoughts both verbally and in writing; however, his extreme egocentricity makes it almost impossible for him to sensibly perceive and interpret what others are thinking or saying. It seems to me that this is the real basis for his extremely poor administrative ability. He would probably function better as an independent investigator, relieved of administrative responsibilities. In my opinion, it is not possible at this point for Dr. Gilbert to reconstitute any worthwhile relationships at this station which he may have had in the past or to generate new ones. I see no way that the research program at this hospital can profit from his continued presence.

by Dr. Jarman to the Veterans Administration headquarters requesting that Dr. Gilbert be reassigned to another station because of the progressive breakdown of Dr. Gilbert's relationships with "almost everyone in this hospital and Emory."

On September 22, 1970, Dr. Jarman assigned Dr. Gilbert to the examination of veterans in connection with pension and compensation claims, an inferior position which this Court, upon an appeal from an interim judgment of the district court denying Dr. Gilbert any relief, characterized as "menial" and "totally unrelated to his highly specialized field of cardiothoracic surgery." *Gilbert v. Johnson*, 490 F.2d 827, 829–30 (5th Cir. 1974). The appellant refused to accept these duties and he took a leave of absence for four months from November, 1970 to March, 1971, during which time he took refresher training in cardiovascular surgery. Upon his return from this leave in March, Dr. Gilbert was ordered transferred to the Des Moines, Iowa VA Hospital for training in general surgery. He considered this as a further attempt to strip him of his cardiothoracic surgery specialty and he claimed he was entitled to a hearing under the Veterans Administration statutes and regulations, since such action by the VA amounted to disciplinary action under 38 U.S.C. § 4110(a). The VA replied that if he did not accept the reassignment, he would be discharged. He refused to accept it and he was discharged on July 30, 1971, without a hearing.

Dr. Gilbert filed this suit on April 4, 1972. On June 16, the court held that Dr. Gilbert was entitled to a hearing pursuant to 38 U.S.C. § 4110 [2] prior to discharge and or-

[2] This section provides as follows:

> (a) The Chief Medical Director, under regulations prescribed by the Administrator shall from time to time appoint boards to

dered that Dr. Gilbert receive back pay in compensation from the VA until the effective date of the decision of the § 4110 disciplinary board. The court however, did not order Dr. Gilbert reinstated as Associate Chief of Staff.

Explaining its reason for holding that the plaintiff was

---

be known as disciplinary boards, each such board to consist of not less than three nor more than five employees, senior in grade, of the Department of Medicine and Surgery, to determine upon notice and fair hearing, charges of inaptitude, inefficiency, or misconduct of any person employed in a position provided in paragraph (1) of section 4104 of this title. When such charges concern a dentist, the majority of employees on the disciplinary board shall be dentists.

(b) The Administrator shall appoint the chairman and secretary of the board, each of whom shall have authority to administer oaths.

(c) The Chief Medical Director may designate or appoint one or more investigators, to assist each disciplinary board in the collection and presentation of evidence. Any person answering to charges before a disciplinary board may be represented by counsel of his own choosing.

(d) A disciplinary board, when in its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action, within limitations prescribed by the Administrator, which shall include reprimand, suspension without pay, reduction in grade, and discharge from the Department of Medicine and Surgery of such person. The Administrator shall either approve the recommendation of the board, approve such recommendation with modification and suspend further action at the time, or disapprove such recommendation. He shall cause to be executed such action as he approves. The decision of the Administrator shall be final.

(e) The Administrator, within such limitations as he may prescribe, may delegate to the Chief Medical Director the authority vested in him by subsections (b) and (d) of this section to (1) appoint the chairman and secretary of a disciplinary board, such official to have the power prescribed by this section, and (2) receive and act upon the recommendations of such a board. Any person against whom disciplinary action is taken under authority delegated pursuant to this subsection shall have the right to appeal such action to the Administrator, but in the absence of such an appeal the decision of the Chief Medical Director shall have the same force and effect as a decision of the Administrator.

entitled to a § 4110 hearing, the court said that the VA's actions suspending him as Associate Chief of Staff, detailing him to examination of compensation and pension payments and his subsequent transfer to Des Moines, Iowa, followed by his subsequent termination in July, 1971:

> originated in personality problems or personality misunderstandings between the plaintiff and others of the Veterans Administration set-up. Apparently, it became apparent to all concerned that Dr. Gilbert would best serve the Veterans Administration somewhere other than at the Atlanta Veterans Administration Hospital.
>
> A major part of the job of Associate Chief of Staff of the Veterans Administration Hospital in Atlanta involved coordination of the research program including the recruitment and stimulation of other investigators who would work with or under the Associate Chief of Staff.
>
> A personality deficiency or personality defect that would interfere with the effective performance of that job [ACOS] is, in effect, a species of inaptitude or inefficiency with respect to the job in question.
>
> Therefore, the removal from the job of Associate Chief of Staff, the detail to compensation claims examinations, and the transfer were in effect actions based upon charges of inaptitude or inefficiency and a hearing was required to be held with respect thereto under Title 38 U.S.C. § 4110.

On August 28, 1972, following the court's order, the VA advised Dr. Gilbert that he had been assigned once again to conduct pension and compensation examinations at the Atlanta VA Hospital. He refused this assignment, arguing that it was not consistent with the court's order, claiming that it was a damaging and punitive disciplinary

action taken without a hearing and amounted to a continued attempt by the VA to arbitrarily destroy his reputation by undercutting his specialized surgical qualifications by placing him in a demeaning position.

In September, 1972, Dr. Jones, Chief of Staff of the VA Hospital began a preliminary investigation of Dr. Gilbert in preparation for the disciplinary board hearing. During several following months, an effort was made to reach a negotiated settlement of the litigation. As a part of this effort, the VA offered Dr. Gilbert an assignment in his specialty, thoracic surgery, at the Little Rock, Arkansas VA Hospital. Dr. Gilbert rejected it, still contending that the VA had not complied witht the court's June 16, 1972 order. Thereafter, the VA assigned Dr. Gilbert to the Outpatient Surgical Clinic of the Atlanta VA Hospital. He rejected this assignment for the same reasons he had turned down the pension and compensation examination position. Thereafter, upon the protest by Dr. Gilbert that the investigation should not be conducted by his superior, Dr. Jones, a second preliminary investigation was started by John R. Pollard of the VA's central office in Washington. In April of 1973, the VA having neither sent a letter of charges to Dr. Gilbert nor held a statutory hearing ordered by the court a year earlier, nor paid the money judgment, Gilbert filed a motion to enforce the judgment which the court denied on May 10, 1973. This Court reversed this judgment on March 6, 1974 and ordered enforcement of the June 16, 1972 judgment.

In the meantime, however, on July 25, 1973, the Veterans Administration served a letter on Dr. Gilbert charging him with failure "to effectively conduct and administer the research program of Veterans Administration

Hospital, because of personality problems and personality misunderstandings. . . ." The letter then contained 22 specific charges, purporting to support the main charge and evidencing Dr. Gilbert's "frequently unsuitable [conduct] for Veterans Administration employees." These charges, if proven to the satisfaction of the board, were supportive of the board's ultimate decision. They included being "rude, discourteous and unprofessional" (Charge IV); launching "into a long tirade" (Charges VI and XXI); "starting to scream, shout and furiously wave [his] arms" (Charge XI); "angrily yelling" (Charge XVII); making "derogatory comments" (Charge XVIII); assuming "a superior air" (Charge XIX); and launching a "diatribe" (Charge XXI).

The disciplinary board hearing commenced on October 15, 1973 and extended through December 12, 1973. On July 17, 1974 the board issued its findings. The board recognized Dr. Gilbert's ability, diligence and energy but stated that "he must, we believe, bear some responsibility for the apparent antagonism evoked by his personality." The board found that "there was no evidence presented of the initiation of any research carrier development program, of any traineeship application actually funded, or of foreign fellowships developed and funded. There was not a single instance in which outside research collaboration involving program developments, *i. e.*, with the Center for Disease Control, NASA or Georgia Tech was finalized, approved and funded." The board ended its report by stating:

> To this extent the board must therefore sustain the charge alleging Dr. Gilbert's failure 'to effectively conduct and administer the research program . . . because of personality problems. . . .'

This was held to be a species of "inaptitude" under 38 U.S.C. § 4110(a). Speaking to the other two grounds mentioned under § 4110(a) for disciplinary action, the board stated: "We do not find specific evidence of inefficiency or of misconduct."

The board made its recommendations in the following language: "We find many extenuating and mitigating circumstances which move us to recommend only minimal disciplinary action which we believe will be in the best interest of Dr. Gilbert and the Veterans Administration."

The disciplinary board then recommended that Dr. Gilbert be reassigned to another VA facility. These findings and recommendation were approved by the Chief Medical Officer of the Veterans Administration and on October 30, 1974, Dr. Gilbert was informed that he would be transferred to the VA Hospital in Birmingham, Alabama. The VA Administrator sustained his medical examiner's approval and the Administrator reaffirmed his decision of transferring Dr. Gilbert by letter of May 2, 1975. Upon Dr. Gilbert's refusal to take the assignment, his services were terminated and he appealed to the district court. The court dealt in detail with each of the many contentions made by the plaintiff under the due process challenge. We have carefully considered each of these and approve the action taken by the trial court. In sum, we are satisfied that the charges made were sufficiently specific to put Dr. Gilbert on notice of what he was required to meet, the hearing was conducted properly, and the decision accorded completely with the standards of due process.

[1] Appellant makes the specific contention that the only action which the board could take against him under § 4110(d) was "reprimand, suspension without pay, reduc-

tion in grade, and discharge from the department of medicine and surgery of such person," whereas, a transfer to another VA Hospital did not fall within these four specific courses of action. Appellant overlooks the fact that the statute says that the board "shall recommend to the Administrator suitable disciplinary action . . . which shall include reprimand, ..." The use of the word "include" clearly indicates that the courses of action that can be recommended by the board do not have to be one of the four actually mentioned. Moreover, it seems clear that since a transfer in grade and pay, without in any way restricting the full benefits of the doctor's speciality in the transferred position, is so much less severe than two of the permissible courses of action actually specified in the statute, no point can be made that the transfer was not authorized under § 4110(d).

[2] Moreover, while it may be understood that a "transfer to Siberia" might normally be a very disruptive penalty to impose, we are of the view that the trial court properly held that a transfer from Atlanta to Birmingham, a distance of 160 miles, in a situation where the board found the doctor was totally unable, on account of his personality traits, to carry out the functions of his office, would seem clearly to fit into the recommendation of the board that he be subjected only to "minimal disciplinary action." This was especially true in light of the board's recommending itself "that Dr. Gilbert be reassigned to another VA facility."

[3] Appellant argues strenuously that since the board stated "we do not find specific evidence of inefficiency or misconduct," the board, in effect, decided against each of the 22 specifications, but then concluded that on the general charge of inaptitude, Dr. Gilbert, should be dis-

ciplined. This statement by the board is not equivalent to a finding that none of the 22 specifications had been proved. It was merely an effort by the board to make clear that, without any reference to the charge of inaptitude, the board did seek to clear Dr. Gilbert of any specific charges of "inefficiency or misconduct," two grounds upon which the board could act, in addition to the ground of inaptitude. In point of fact, the board's report discussed evidence introduced to support several of the specifications. While it is clear that the board found it a painful duty to criticize this well trained professional man, its findings fully meet the requirement of the statute and regulations and fully warrant the particular action taken pursuant thereto.

[4] As we have already pointed out, the only question with respect to the due process claim is whether the administrative record demonstrates that the doctor had adequate notice and opportunity to be heard and a decision in accord with the charges made and whether the decision was arbitrary or capricious. We noted the cases of *Davis v. Vandiver*, 494 F.2d 830 (5th Cir. 1974); *Dozier v. United States*, 473 F.2d 866 (5th Cir. 1973) and *Chiriaco v. United States*, 339 F.2d 588 (5th Cir. 1964) as supporting this standard of review. However, as we did in the *Dozier* case, *supra*, we consider it not inappropriate to state that were the standard of review here that of substantial evidence on the record as a whole, as is contended for by the appellant, then we would have no hesitancy in determining that this record adequately discloses sufficient evidence to support the board's conclusion that Dr. Gilbert failed "to effectively conduct and administer the research program . . . because of personality problems. . . ."

We have carefully analyzed the other points made by Dr. Gilbert on this appeal, and are satisfied that they were properly disposed of by the trial court.

[5] The defendants appeal from a part of the judgment that required payment of Dr. Gilbert's salary until the date of the board's decision. Responding to a post-hearing motion by the government dealing with this matter, the trial court pointed out that the court had in its June 16, 1972 judgment, ordered that "the plaintiff will be entitled to receive compensation until the effective date of the decision of the board convened under the statute;" that this order was still in effect, and that except for the time taken by Dr. Gilbert on leave of absence, he was still entitled under the effective earlier order to receive compensation except when on leave of absence. We agree with that determination by the trial court. The date to which Dr. Gilbert is to receive compensation is May 2, 1975, the day on which the Administrator finally reaffirmed his decision to transfer him to Birmingham.

There is a separate appeal before this court by Sam F. Lowe, Jr., Esq., formerly counsel for Dr. Gilbert. Upon the latter's expressed wish to change counsel, Lowe sought to be relieved from any further representation by an order of the trial court. The court granted the request, but denied Lowe's motion for the right to intervene to protect his interests for a fee covering services theretofore rendered.

[6] It appears that under the Georgia law (Ga.Code § 9–613), plaintiff's lawyer has a lien upon a cause of action being asserted for payment of compensation contracted to be paid for such services. It therefore appears that this was an interest in this litigation for which pro-

tection from the court can properly be sought by allowing the party to intervene in the pending action. This court has held as much in a case involving a contingent fee arrangement in *Gaines v. Dixie Carriers, Inc. v. Plotkin, Sapir & Brandley*, 434 F.2d 52 (5th Cir. 1974). We cannot distinguish between that case and the case presented here by Mr. Lowe. The trial court should have permitted the intervention.

The judgment between the original parties is AFFIRMED and the judgment denying the Lowe intervention is REVERSED and the case is REMANDED to the trial court for further proceedings.

AFFIRMED in part, REVERSED in part, and REMANDED.

ALVIN B. RUBIN, Circuit Judge, specially concurring:

Were the matter open for consideration, I would deny lawyers employed on a contingent fee the right to intervene in order to safeguard their fees, at least when they can protect their interest in some other way. A lawyer is entitled to protection, but he can usually safeguard the fee he has earned by some means other than intervention. In such cases "the disposition of the action [will not] as a practical matter impair or impede his ability to protect that interest." Rule 24(a)(2), F.R.C.P.

In Georgia, a lawyer employed on a contingent fee basis has a lien on any recovery, and the suit may not be satisfied until the lien of the attorney is fully satisfied. Ga.

Code Ann. (1973) § 9–613. *See Dorsey v. Edge*, 1947, 75 Ga.App. 388, 43 S.E.2d 425. The attorney has no right to his fee unless the event contracted for has occurred; nor may he recover his fee by action in the cause in which the fee is earned. *Haldi v. Allen*, 1977, 141 Ga.App. 414, 233 S.E.2d 478. He may, however, if discharged from the case by his client, bring an action under quantum meruit for the reasonable value of services rendered. *Brookhaven Supply Co., Inc. v. Rary*, 1974, 131 Ga.App. 310, 205 S.E.2d 885. If the client dismisses the suit, settles it, or allows it to lie dormant, the lawyer apparently may also establish the amount of recovery that could have been had, and the consequent amount of his lien, by prosecuting the suit independently. *See Haldi v. Allen, supra; Dorsey v. Edge, supra.*

In Louisiana, (to whose law I advert because our prior decision in *Gaines v. Dixie Carriers, Inc.*, 5 Cir. 1970, 434 F.2d 52, involved a Louisiana lawyer-client agreement), the attorney's interest can be protected by filing the contract of employment with the clerk of court; thereafter any settlement or other disposition of the suit or claim by either the lawyer or the client without the written consent of the other is void. LSA-R.S. 37:218.

If there is an absolute right to intervene, the former lawyer may attempt to assert new issues or indeed to interfere with the management of the lawsuit by his successor as if he were a co-owner of the claim when he has only a contingent fee and should only be entitled to protection with respect to payment of the amount due him. *See* C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1920 (1972); 3B Moore's Federal Practice ¶24.16 (2d ed. 1978).

In the present case, Mr. Lowe seeks only to collect his fee if Dr. Gilbert is successful. That right deserves protection but it can be protected by assertion of a lien. Therefore, I would prefer to hold that he is not entitled to intervene.

However, without discussion of the question of the adequacy of other protection, the right to intervene in these circumstances has been recognized both before the adoption of Rule 24, *Barnes v. Alexander*, 1914, 232 U.S. 117, 34 S.Ct. 276, 58 L.Ed. 530, and since, *Gaines v. Dixie Carriers, Inc.*, 5 Cir., *supra*. These views appear to be binding on us, but I hope that they will be reconsidered some day lest the practice of intervention permitted to lawyers formerly employed by a litigant unnecessarily adds to the length and complexity of trials.

APPENDIX F

[U. S. COURT OF APPEALS
Filed Oct. 5, 1979, GILBERT E. GANUCHEAU, Clerk]

FOR THE FIFTH CIRCUIT

NO. 77-1063

DR. JOSEPH GILBERT,
Plaintiff-Appellant,
Cross-Appellee,

versus

DONALD JOHNSON, ET AL.,
Defendants-Appellees,
Cross-Appellants,

SAM F. LOWE, JR.,
Movant-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING

(October 5, 1979)

Before TUTTLE, GODBOLD and RUBIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ JOHN GODBOLD
United States Circuit Judge

Supreme Court, U.S.
FILED
MAR 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1040

In the Supreme Court of the United States

OCTOBER TERM, 1979

DR. JOSEPH GILBERT, PETITIONER

v.

MAX CLELAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1040

DR. JOSEPH GILBERT, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner is a medical doctor who was appointed Associate Chief of Staff for Education and Research at the Atlanta Veterans Administration Hospital in 1965 (Pet. App. E-5). Significant personal relationship problems eventually developed between petitioner and other members of the hospital staff, prompting the hospital director to relieve petitioner of his administrative duties and to seek his transfer to another facility (*id.* at E-5 to E-7). In 1970, petitioner was assigned to an inferior position in the hospital, which he refused to accept. In 1971, petitioner was ordered transferred to another VA hospital for training in general surgery, which he also refused to accept because it did not involve his specialty of cardiothoracic surgery Following his refusal to accept

the transfer, petitioner was discharged by the VA (*id.* at E-7). He then filed this action in the United States District Court for the Northern District of Georgia in April 1972. The district court found that petitioner had been entitled to a pre-discharge hearing pursuant to 38 U.S.C. 4110 and ordered that petitioner receive back pay until the date of a decision by a VA disciplinary board under Section 4110 (Pet. App. E-7 to E-9).

After more than a year of attempts to settle this matter and to assign petitioner to an appropriate position, the VA sent petitioner a letter in July 1973, containing 22 charges supporting the VA's contention that petitioner had failed to conduct effectively the research program for the Atlanta VA hospital (Pet. App. E-9 to E-11). A disciplinary board met from October to December 1973 to consider these charges (*id.* at E-11). In July 1974, the board issued its findings, concluding that petitioner had failed to conduct a research program properly because of his personality problems (*id.* at B-11 to B-12; E-11 to E-12). The board recommended "minimal disciplinary action" against petitioner and suggested that he be reassigned to another VA facility (*id.* at B-12, B-13; E-12). The VA Chief Medical Officer approved the board's findings and recommendation and transferred petitioner to the VA hospital in Birmingham, Alabama. This action was sustained by the VA Administrator in May 1975. When petitioner refused to accept this assignment, his services were terminated (*id.* at E-12).

Petitioner again sought judicial review. In a thorough opinion, the district court considered all of petitioner's challenges to the VA decision and upheld the agency's

actions. 419 F. Supp. 859 (N.D. Ga. 1976). The court of appeals affirmed (Pet. App. E-1 to E-18). 601 F. 2d 761 (5th Cir. 1979).[1]

2. The decisions of the courts below on petitioner's various claims are correct and do not require further review.

Contrary to petitioner's contention (Pet. 12-21), he was not denied due process of law by the VA's refusal to permit pre-hearing discovery of statements of certain persons interviewed by agency investigators. When petitioner requested these items prior to the hearing, the VA informed him that the disciplinary board would only consider material presented at the hearing and that any such material would be made available to petitioner at the hearing. 419 F. Supp. at 874-875. Petitioner was never prevented from personally interviewing VA employees as prospective witnesses, and he had ample opportunity for cross-examination at the hearing. 419 F. Supp. at 875-876.[2] In these circumstances, the courts below correctly concluded that due process does not require pre-administrative hearing discovery of witness statements

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[1]The appellate court reversed and remanded a part of the district court judgment that is irrelevant to the issues now before this Court (Pet. App. E-15 to E-18).

[2]Moreover, the district court noted that under VA procedures, petitioner had the right, among other things: to a letter of charges; to a response to the charges; to a hearing before a disciplinary board; to appear personally at the hearing with counsel; to call witnesses on his behalf; to question witnesses; to respond only to charges of which he was notified; and to have the board rule solely on the evidence presented. 419 F. Supp. at 876-877. In light of these procedures, both lower courts correctly found that petitioner's disciplinary board hearing met the standards of due process. 419 F. Supp. at 876-878; Pet. App. E-12. See *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Bishop* v. *Wood*, 426 U.S. 341, 349-350 (1976).

and that no error had been committed. 419 F. Supp. at 878; Pet. App. E-12, E-14 to E-15. See *P.S.C. Resources, Inc.* v. *NLRB*, 576 F. 2d 380, 386-387 (1st Cir. 1978); *Silverman* v. *CFTC*, 549 F. 2d 28, 33 (7th Cir. 1977); *Frilette* v. *Kimberlin*, 508 F. 2d 205, 208 (3d Cir.) (en banc), cert. denied, 421 U.S. 979 (1975).[3] See also *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 237 n.16, 239-242 (1978).

Petitioner also contends (Pet. 21-32) that his transfer was not authorized by 38 U.S.C. 4110, which empowers the board to recommend disciplinary action, "which shall include reprimand, suspension without pay, reduction in grade, and discharge * * *." The courts below held that the word "include" is flexible enough to comprehend a transfer—a remedy less severe than some of the disciplines specifically authorized. 419 F. Supp. at 882-883; Pet. App. E-12 to E-14. The disciplinary board's recommendation that petitioner be assigned to another facility was clearly appropriate in light of the importance of harmony in a hospital working environment. See *Stretten* v. *Wadsworth Veterans Hospital*, 537 F. 2d 361, 368 (9th Cir. 1976).[4]

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[3]The two decisions on which petitioner principally relies (Pet. 19) are distinguishable. *Ferguson* v. *Thomas*, 430 F. 2d 852 (5th Cir. 1970), as the district court properly pointed out (419 F. Supp. at 878), does not establish a rigid due process standard and must now be read in light of *Arnett* v. *Kennedy*, *supra*. In *NLRB* v. *Safway Steel Scaffolds Co.*, 383 F. 2d 273, 277 (5th Cir. 1967), the court stated that under NLRB rules, pre-hearing discovery is available but that the denial of discovery in that instance did *not* violate due process.

[4]Petitioner also claims (Pet. 30-32) that the transfer strips him of his rating as a "surgeon" in violation of 38 U.S.C. 4108(c), which prohibits withdrawal of a rating "as a medical, surgical or dental specialist" without a finding by a board of examiners that the person is "no longer qualified in his specialty." However, petitioner performed research rather than patient care duties at the Atlanta VA hospital, and the Birmingham VA facility also proposed to use him in a cardiovascular research role. See 419 F. Supp. at 863, 868; Pet. 23.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

DOJ-1980-03